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Supreme Court of the United States

OCTOBER TERM, 1948

No. 45

JOE J. FISHER, PETITIONER,

vs.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED APRIL 21, 1948.

CERTIORARI GRANTED MAY 24, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

JOE J. FISHER, PETITIONER,

vs.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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[fol. 1] **IN THE SUPREME COURT OF TEXAS**

No. —

Ex Parte Joe Fisher, Relator.

Application for Writ of Habeas Corpus—Filed June 17, 1947

To Said Honorable Court:

Comes now Joe Fisher, Relator, and respectfully shows that he is an attorney at law duly licensed by the Supreme Court of Texas, and that he is now unlawfully confined and restrained of his liberty at Jasper in Jasper County, Texas, by the Sheriff of said County. The said confinement and restraint were ordered orally by F. P. Adams, District Judge in and for said County, on this the 17th day of June, 1947, for alleged contempt on the part of the said Joe Fisher in the presence of said Judge while the said Joe Fisher was engaged in the trial of a civil case before said Judge. At the time and occasion in question Relator maintained the respect due to Courts and Judicial Officers and did no act or deed intending to embarrass the administration of justice. During the trial of said civil case, Relator took an exception to the Court's action which he believed to be necessary to protect the rights of his client whose case was then on trial. Relator in a respectful tone, manner and language attempted to state said exception to the Court before whom he was trying said case, and the Court's oral order to the Sheriff of [fol. 2] Jasper County to take Relator in custody for a period of three days resulted from Relator's statement of such exception.

The facts and occurrences as they actually happened, claimed by the Judge to be the basis for the contempt, as reflected by the Court Reporter's notes, are attached hereto as Exhibit "A". A copy of the judgment of the Court is attached as Exhibit "B". It is wholly insufficient as a matter of law.

The commitment of Relator results solely from the oral order of the Judge to the Sheriff of Jasper County and no character of writ or process has been issued in support of such oral order, but Relator has been and is now re-

strained and confined by said Sheriff as a result of said oral order.

The facts upon which the oral order of the Judge was based are wholly insufficient to constitute contempt of the Court on the part of Relator. The Court exceeded his jurisdiction in adjudging the Relator guilty of contempt on such facts. The Court exceeded his jurisdiction in remanding Relator to custody of said Sheriff upon the basis of said oral order and without any character of writ or process, and Relator's confinement and restraint by said Sheriff upon the basis of said oral order are illegal and unauthorized.

Wherefore, Relator prays the Court to grant and issue a writ of habeas corpus to have him brought before the Court to the end that he may be discharged from such illegal confinement and restraint; and in the meantime prays that he be admitted to bail in such amount as may be fixed by the Court or any Justice thereof.

Joe Fisher, by (Signed) Everett L. Looney, His Attorney of Record.

[fols. 3-4] STATE OF TEXAS,
County of Travis:

Before me, the undersigned authority, on this day personally appeared Everett L. Looney, known to me, who being first duly sworn upon oath says that he is an attorney of record for Joe Fisher; that he prepared the foregoing application in behalf of Joe Fisher; that he has full authority so to do; that he has reason to believe and does believe that the allegations contained in said application are true and correct.

(Signed) Everett L. Looney.

Sworn to and subscribed before me by the said Everett L. Looney this 17th day of June, 1947. (Signed) Birdie Holland, Notary Public, Travis County, Texas. (Seal.)

(Exhibits "A" and "B", attached to the original application for habeas corpus, are omitted, as the same are substantially incorporated in the supplemental application for writ of habeas corpus, which follows:

[File endorsement omitted.]

[fol. 5] No. A-1328

IN THE SUPREME COURT OF TEXAS

EX PARTE JOE FISHER, Relator

SUPPLEMENTAL APPLICATION FOR WRIT OF HABEAS CORPUS—
Filed July 9, 1947

To Said Honorable Court:

Comes now Joe J. Fisher, Relator in the above styled and numbered cause, and would respectfully show the Court the following:

I

At the time of the filing and presentation of the original application for writ of habeas corpus herein on June 17, 1947, Relator was confined and restrained of his liberty at Jasper in Jasper County, Texas, by the Sheriff of said County, and, as a consequence, it was necessary for Relator's Austin attorneys to obtain the facts pertaining to such confinement and to transcribe the instruments in connection therewith by telephone. Hence, although the original application contains the essence of Relator's cause of action herein, Relator desires to aid the Court in deciding this cause by supplementing his original application and by elaborating upon the allegations therein with facts and instruments hereinafter set forth.

[fol. 6] II

Relator is an attorney at law duly licensed by the Supreme Court of Texas, and at the time of the filing of the original application for writ of habeas corpus herein on June 17, 1947, and before said time, was unlawfully confined and restrained of his liberty at Jasper in Jasper County, Texas, by the Sheriff of said County. Said confinement continued until approximately 4:45 o'clock p. m. on said day when Relator was released upon $500.00 bond by order of this Honorable Court. The fact of such confinement is shown by the affidavit of said Sheriff, attached hereto and marked "Exhibit A."

III

Said confinement and restraint were ordered orally by F. P. Adams, District Judge in and for said County, for

alleged contempt on the part of Relator while Relator was engaged in making a jury argument in the civil case of *Anderson Godfrey v. Texas Indemnity Insurance Company*, No. 4075, then on trial before said Judge. A certified copy of the special issues which formed the basis of Relator's argument is attached hereto and marked "Exhibit B." A certified copy of an agreement between counsel which has a bearing upon the alleged contempt is also attached hereto and marked "Exhibit C."

IV

At the time and occasion in question Relator maintained all respect due to courts and judicial officers and did no act or deed calculated or intended to embarrass the administration of justice or to demean the dignity of the courts. The facts pertaining to the alleged contempt are shown in the official transcript of the court reporter, attached hereto and marked "Exhibit D," and the identical facts are also set forth in the "amended order of contempt," a certified copy of which is attached hereto and marked "Exhibit K." As is shown by said facts, the trial court rightly or wrongly sustained an objection to Relator's jury argument, and Relator thereafter resumed his argument by omitting all reference [fol. 7] to the matter to which the objection was sustained. Upon a renewed objection to his argument, Relator attempted to ask the trial court whether the court had theretofore sustained the objection with respect to the whole of his argument or only to a specific part of the same, and Relator was interrupted by the trial court before he could make such inquiry. Following subsequent remarks by the trial court, Relator excepted to the conduct of the trial court, and it was at this point that Relator was held in contempt. In attempting to make his inquiry and in excepting to the ruling of the trial court and to the conduct of the trial court, Relator spoke in a respectful tone and with respectful manner and language. Affidavits from all twelve of the jurors in the case on trial, from three bystanders, and from Relator's associate counsel are attached hereto and marked "Exhibits E-I," respectively. Said affidavits attest to the respectful tone, manner of language of Relator during the course of the acts which allegedly constitute contempt.

V

Following the occurrence of the acts which allegedly constitute contempt, Relator was immediately taken into custody by the Sheriff and Deputy Sheriff at approximately 9:30 o'clock a. m. on June 17, 1947, and was then and there confined and restrained of his liberty in the County jail until released by order of this Court at approximately 4:45 o'clock p. m.

The taking into custody of Relator as aforesaid and his confinement and restraint resulted solely from the verbal order of the trial judge.

At approximately 9:40 o'clock p. m. an order of contempt was filed by the trial judge. A certified copy of said order is attached hereto and marked "Exhibit J." No commitment was ever issued upon the basis of said order, and Relator was never arrested under any commitment or other similar process issued in connection with said order.

[fol. 8] At approximately 3:25 o'clock p. m. an "amended order of contempt" was filed by the trial judge. A certified copy of this order is attached hereto and marked "Exhibit K." Relator was not present before said judge when this order was rendered or entered, and after his removal from the courtroom at 9:30 o'clock a. m., Relator remained constantly in the custody of the Sheriff of Jasper County and at no time thereafter was returned to the courtroom.

At 3:40 o'clock p. m., the Sheriff of Jasper County sent a telegram to Relator's Austin attorneys for use in connection with the application for writ of habeas corpus in which he stated that he was holding Relator solely upon verbal order from the trial court, and that there had been delivered to him no order, commitment or other written instrument to serve as a basis for his detention of Relator. A copy of this telegram is attached hereto and marked "Exhibit L."

At approximately 3:45 o'clock p. m. a commitment was issued to the Sheriff of Jasper County upon the basis of the aforementioned "amended order" and said commitment was served upon Relator at approximately 3:48 o'clock p. m., while Relator was still confined in the County jail under verbal order of the trial judge. A certified copy of this commitment accompanies "Exhibit K," the copy of the amended order.

At approximately 4:45 o'clock p. m., Relator was released from custody by order of this Honorable Court by giving bond in the amount of $500.00.

VI

All exhibits attached hereto are incorporated herein by reference as fully as if same were copied and set forth herein.

VII

(a) Relator asserts that the undisputed facts relating to the alleged contempt, as contained and set forth in Exhibits "D" and "L," the latter being the "amended order" of the trial judge, are wholly insufficient to constitute contempt of the trial court; that the trial court exceeded its jurisdic-[fol. 9] tion in adjudging Relator guilty of contempt upon the basis of such facts; and that the trial court possessed no jurisdiction or authority to render a judgment of contempt upon such facts.

(b) Relator asserts that the trial court exceeded its jurisdiction in remanding Relator to the custody of the Sheriff of Jasper County by verbal order and without any character of writ or process; that Relator's confinement and restraint by said Sheriff upon the basis of said oral order were illegal and unauthorized; and that by such confinement and restraint Relator was deprived of his liberty without due process or due course of the law of the land in contravention of Section 19 of Article I of the Texas Constitution and of the Fourteenth Amendment to the Constitution of the United States.

(c) Relator asserts that the order of contempt entered at 9:40 o'clock a. m. as aforesaid is void upon its face in that it is a mere statement of legal conclusions; that it does not set forth the nature of the alleged contemptuous acts or occurrences; that it does not set forth the precise acts or occurrences which form the basis of the alleged contempt; that it is in fact no true order or judgment since it adjudicates or orders nothing; and that it nowhere authorizes or directs the issuance of a writ of commitment or the detention of Relator thereunder.

(d) Relator asserts that his continued detention after the entry of the aforementioned order of 9:40 o'clock a. m.

was illegal and unauthorized for the reasons stated in the preceding paragraphs, and that the entry of said order in no way legalized or authorized such detention.

(e) Relator asserts that the "amended order" of contempt which was entered at 3:25 o'clock p. m. and the commitment issued and served thereunder are void and of no force and effect in that the alleged contemptuous acts recited in said order do not as a matter of law constitute contempt or support the judgment made therein; that said acts as recited reveal as a matter of law that Relator was not guilty of the contempt of which he was adjudged; [fol. 10] that said "amended order" is void because conflicting and contradictory; that said "amended order" is void because entered after the trial court had lost jurisdiction of the person of Relator; that said "amended order" is void because entered after this Honorable Court had acquired jurisdiction of this cause; that said "amended order" is void because not entered in timely fashion after the arrest and detention of Relator; that said "amended order" is void because entered without affording Relator notice and an opportunity to be heard on same since said order was entered long after the occurrence of the alleged contemptuous acts; and that the commitment issued upon the basis of said "amended order" and the arrest thereunder are void because of the voidness of said order.

(f) Relator asserts that his continued detention after the entry of the aforementioned order of 3:25 o'clock p. m. and the issuance and execution thereunder was illegal and unauthorized for the reasons stated in the preceding paragraphs, and that the entry of said order in no way legalized or authorized such detention.

Wherefore, Relator renews the prayer contained in his original application and prays that this Court grant and make final its writ of habeas corpus herein to the end that he may be discharged from his bond and from his illegal confinement and restraint.

Collins, Dies, Williams and Garrison, J. L. Collins, Martin Dies, Lufkin, Texas; Looney and Clark, Everett L. Looney, Edward Clark, R. Dean Moorhead, Brown Building, Austin, Texas, Attorneys for Relator.

[fol. 11] STATE OF TEXAS,
County of Travis:

Before Me, the undersigned authority, on this day personally appeared Joe J. Fisher, known to me, who being first duly sworn upon oath says that he is the Relator in the cause to which the foregoing Supplemental Application for Writ of Habeas Corpus is directed; that he has read said Supplemental Application; and that the facts stated therein are true and correct.

Joe J. Fisher.

Sworn to and subscribed before me by the said Joe J. Fisher this 8th day of July, 1947. Birdie Holland, Notary Public, Travis County, Texas. (Seal.)

[fol. 12] EXHIBIT "A" TO APPLICATION

IN THE SUPREME COURT OF TEXAS

No. —

EX PARTE JOE J. FISHER

THE STATE OF TEXAS,
County of Jasper:

Before Me, J. H. Dickerson, a Notary Public in and for Jasper County, Texas, on this day personally appeared R. C. Pace, Sheriff of Jasper County, Texas, who, being by me duly sworn upon oath, says:

"I certify that I am the duly elected and qualified Sheriff of Jasper County, Texas, and was so acting on the morning of July 17, A. D. 1947. At about 9:30 A. M. on this occasion, Joe J. Fisher, attorney for Anderson Godfrey in Cause No. 4075, styled Anderson Godfrey vs. Texas Indemnity Insurance Company, was making his opening argument to the jury when he was held in contempt of court and fined $100.00 and three days in jail. My deputy, Martel Mixon, and I were orally ordered by Judge F. P. Adams, District Judge of Jasper County, Texas, to remove Mr. Fisher from the District Courtroom at about 9:30 A. M. Mr. Fisher was removed to the County Jail immediately,

in accordance with Judge Adams' oral order. At the time of his removal to the County Jail, no written order of contempt had been entered by Judge Adams and no written order of commitment had been entered. We were acting in accordance with Judge Adams' oral order.

On June 17, 1947, at 3:45 o'clock P. M., there came to my hand a copy of the Order of Commitment and a certified copy of the Judgment in the case of contempt above referred to. The Order of Commitment was executed at 3:48 P. M. July 17, 1947, be delivering to Joe J. Fisher, who was in my custody in the Jasper County, Texas, jail and had been continuously in my custody since 9:30 A. M., a copy of the Order of Commitment and a certified copy of the Judgment in the contempt case. I served the same [fol. 13] upon Mr. Fisher at the Jasper County Jail at 3:48 o'clock P. M. June 17, 1947.

Mr. Fisher was released from my custody under a $500.00 bond, in accordance with information received from Mr. George H. Templin, Clerk of the Supreme Court of Texas, at approximately 4:50 P. M., June 17, 1947.

Mr. Joe J. Fisher was in my actual custody and restrained of his liberty at the Jasper County, Texas, jail from about 9:30 A. M., June 17, 1947, until about 4:50 P. M. June 17, 1947, and at all times mentioned remained my prisoner, and never returned to the presence of the Court at any time, while in my custody.

(S.) R. C. Pace, Sheriff, Jasper County, Texas.

Subscribed and sworn to before me by the above affiant this the 2nd day of July, A. D. 1947, to certify which witness my hand and seal of office. (S.) J. H. Dickerson, Notary Public in and for Jasper County, Texas. (Seal.)

[fol. 14] EXHIBIT "B" TO APPLICATION

IN THE DISTRICT COURT OF JASPER COUNTY, TEXAS

No. 4075

ANDERSON GODFREY

vs.

TEXAS INDEMNITY INSURANCE COMPANY

Charge of the Court

GENTLEMEN OF THE JURY:

This case will be submitted to you upon special issues, by which is meant the Court will ask you certain questions as contained in this charge, which you will answer in the spaces provided therefor. Your answers to the questions contained herein will constitute your verdict in this cause.

You are the sole and exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony; but the law you will receive from the Court as contained in this charge and be governed thereby.

You must not discuss or consider what effect any of your answers may have upon the rights of the parties nor the judgment that may be rendered by the Court in this case, as it will be the duty of the Court to determine those matters.

By the term "Preponderance of the evidence", wherever it may appear in this charge, is meant the greater weight and degree of credible evidence.

By the term "Natural result", as used in this charge, is meant that result produced by an injury, by itself, or in connection with another cause or other causes, in a natural and continuous sequence, and which result would not have occurred but for such injury.

By the term "Injury", as used herein is meant damage or harm to the physical structure of the body, and such diseases or infection as naturally result therefrom.

[fol. 15] You are instructed that the term "Total incapacity", wherever it may appear in this charge, does not imply an absolute disability to perform any kind of labor, but a person physically disabled to such an extent or degree that he cannot perform the usual tasks of a workman in

such a manner as to be able to produce and retain employment is ordinarilly regarded as totally incapacitated.

By the term "Partial loss of use", as used in this charge, is meant an impairment of the normal functioning of the foot which decreases, but does not destroy, its usefulness in the performance of the usual tasks of a workman.

Now, bearing in mind the foregoing instructions and definitions, and such other instructions and definitions, if any, as may be given to you hereinafter, you will answer the following questions:

Special Issue No. 1

Do you find from a preponderance of the evidence that Anderson Godfrey sustained total incapacity, if any, as a natural result of the injury to his left foot, if any, sustained by him on or about September 25, 1946?

Answer "Yes" or "No".

Answer: —— ——

Special Issue No. 2

When do you find from a preponderance of the evidence that such total incapacity, if any, began?

Answer by stating the date, if any.

Answer: —— ——.

[fol. 16] Special Issue No. 3

How long do you find from a preponderance of the evidence that such total incapacity, if any, has continued or will continue from the date of its beginning, if any?

Answer by stating the date or number of weeks, if any, or answer "None".

Answer: —— ——.

Special Issue No. 4

Do you find from a preponderance of the evidence that Anderson Godfrey has sustained a partial loss of the use of his left foot as a natural result of the injury, if any, sustained to such foot on or about September 25, 1946?

Answer "Yes" or "No".

Answer: —— ——.

Special Issue No. 5

When do you find from a preponderance of the evidence that such partial loss of the use, if any, of Anderson Godfrey's left foot began or will begin?

Answer by stating the date, if any.

Answer: —— ——.

Special Issue No. 6

How long do you find from a preponderance of the evidence that such partial loss of the use, if any, of Anderson Godfrey's left foot has continued or will continue from the date of its beginning, if any?

Answer by stating the date or the number of weeks, if any, or answer "None".

Answer: —— ——:

[fol. 17] Special Issue No. 7

What do you find from a preponderance of the evidence to be the extent or degree of such partial loss of the use, if any, of Anderson Godfrey's left foot?

Answer by stating the percentage, if any.

Answer: —— ——.

After argument of counsel, you will retire, select your foreman and indicate your findings to each of the issues in this Charge in the spaces provided therefor following each issue, after which your foreman will sign such as your verdict and return the same into open Court as your verdict in this case.

F. P. Adams, Judge Presiding.

We, the jury, have answered the issues submitted to us as shown and indicated above in the spaces provided for our answers to each of such issues, and now return the same into open Court as our verdict in this case.

——, Foreman of the Jury.

Endorsed: No. 4075, Anderson Godfrey vs. Texas Indemnity Insurance Company, the Court's Charge, Filed June 17, 1947, at 9:00 o'clock A. M. by Mrs. T. B. Prewitt, District Clerk of Jasper County, Texas.

[fol. 18] THE STATE OF TEXAS,
County of Jasper:

I, Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas, hereby certify that the above and foregoing is a true and correct copy of The Court's Charge in Cause No. 4075, styled Anderson Godfrey vs. Texas Indemnity Insurance Company as same appears on file in the District Clerk's Office of Jasper County, Texas.

Given under my hand and seal of office at Jasper, Texas, this the 28th day of June, A. D. 1947.

(S.) Mrs. F. B. Prewitt, Clerk of the District Court of Jasper County, Texas. (Seal.)

[fol. 19] EXHIBIT "D" TO APPLICATION

No. 4075

IN THE DISTRICT COURT OF JASPER COUNTY, TEXAS

ANDERSON GODFREY

vs.

TEXAS INDEMNITY INSURANCE COMPANY

STATEMENT OF FACTS ON CONTEMPT PROCEEDING

Be It Remembered that on the 17th day of June, A. D. 1947, during the proceedings of the above entitled and numbered cause and during the argument of counsel to the jury, while Hon. Joe J. Fisher, attorney for Plaintiff, was presenting his argument to the jury, the following proceedings were had:

APPEARANCES:

Hon. Joe H. Tonahill, Jasper, Texas. By: Hon. Joe J. Fisher, Jasper, Texas; Counsel for Plaintiff.

Messrs. Fountain, Cox & Gaines, Houston, Texas. By: Hon. Joyce Cox, Houston, Texas; Hon. John G. Seaman, Houston, Texas; Hon. T. Gilbert Adams, Jasper, Texas, Counsel for Defendant.

Opening argument to Jury of Plaintiff's Attorney, Hon. Joe J. Fisher:

Now, bear in mind, gentlemen, that this is what we call [fol. 20] a specific injury. A general injury is an injury to the entire body. This is what is known as a specific injury, and it is confined to the left foot. We have specific injuries where you have injuries to the eye, to your hand, and to your foot; this is an injury to the foot, to the left foot; and the law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. That is the most compensation Anderson Godfrey could receive, would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate.

By Mr. Cox: Your Honor please——

By the Court: Wait a minute.

By Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

By the Court: That has all been agreed upon.

By Mr. Fisher: I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

By the Court: They are not interested in dollars and cents.

By Mr. Fisher: They are interested to this extent——

By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

By Mr. Fisher: Note our exception.

By the Court: All right. This negro, as I stated, can [fol. 21] only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.

By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.

By Mr. Fisher: I am asking——

By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

By Mr. Fisher: That is all right. We take exception to the conduct of the Court.

By the Court: That is all right; I will fine you $25.00.

By Mr. Fisher: If that will give you any satisfaction.

By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the clerk $50.00.

By Mr. Fisher: You mean for trying to represent my client?

By the Court: No, sir; for contempt of Court. Don't argue with me.

By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument——

By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.

[fol. 22] By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.

By the Court: That will be a hundred dollar fine and three days in jail. Take him out.

By Mr. Fisher: I demand a right to state my position before the audience.

By the Court: Don't let him stand there. Take him out.

* * * * * * *

I, L. R. Alvis, Court Reporter of the 1st Judicial District of Texas, hereby certify that the above and foregoing four pages constitutes a full, true and correct transcript of the proceedings had in the District Court of Jasper County, Texas, on June 17, 1947, in the case of Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075, at which time the attorney for Plaintiff, Joe J. Fisher, was fined by the Court for contempt of Court; as the same has been by me transcribed from my shorthand notes taken at the time of such action, both to the best of my skill and ability.

In Testimony Whereof, witness my hand at Jasper, Texas, this 17th day of June, A. D. 1947.

(S.) L. R. Alvis, Court Reporter, 1st Judicial District of Texas.

[fol. 23] EXHIBIT "E" TO APPLICATION

IN THE SUPREME COURT OF TEXAS

NO. —

EX PARTE JOE J. FISHER

THE STATE OF TEXAS,
County of Jasper:

Before Me, Joe H. Tonahill, a Notary Public in and for Jasper County, Texas, on this day personally appeared the undersigned jurors who served in the case of Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075, in the District Court of Jasper County, Texas, on June 17, 1947, who being by me duly sworn upon oath says:

"We, the undersigned, were duly qualified, selected and sworn as jurors in Cause No. 4075, Anderson Godfrey vs. Texas Indemnity Insurance Company in the District Court of Jasper County, Texas, and on June 17, 1947, at approximately 9:30 A. M., while Mr. Joe J. Fisher, attorney for plaintiff, Anderson Godfrey, was making his opening argument, he made a statement to the effect that this was a specific injury case and that the plaintiff was entitled under the law to one hundred twenty-five (125) weeks compensation at the average weekly compensation rate. Mr. Joyce Cox, attorney for the defendant, Texas Indemnity Insurance Company, objected to this argument and which objection was sustained by Judge F. P. Adams, presiding Judge; Mr. Fisher attempted to explain his argument and was told by Judge Adams not to argue with him and that he would declare a mistrial if Mr. Fisher messed with him two and a half minutes, and fine him besides. Subsequent to this incident, Mr. Fisher was held in contempt of court and fined $100 and ordered to jail for three days, and the Sheriff waiting upon the court was ordered to remove Mr. Fisher from the courtroom. Mr. Fisher made the statement that he was making no effort to commit contempt, but was merely trying to represent the plaintiff as best he could. [fol. 24] At no time while Mr. Fisher was arguing his case to the jury and during the ensuing colloquy between Mr. Fisher and Judge Adams did Mr. Fisher show or demonstrate any anger or intemperate conduct bearing

upon his dignity as a lawyer; nor did Mr. Fisher make any statements to Judge Adams which could be considered discourteous or insulting; nor at any time did Mr. Fisher raise his voice or conduct himself in such a manner that indicated disrespect for the Judge presiding; but rather on the other hand, Mr. Fisher at all times during the argument and ensuing colloquy with Judge Adams acted with dignity, spoke in moderate tones, indicative of respect for the court and conducted himself in every respect as a gentlemen.

Frank J. Daily, R. C. Smith, Clarence G. Smith, ——— ———, ——— ———, ——— ———, Louis K. Davis, O. C. Stringer, R. H. Hancock, V. G. Pringle, B. E. Housel, E. M. Statt.

Subscribed and sworn to before me by the above affiants this the 23rd day of June, A. D. 1947, to certify which witness my hand and seal of office. Joe H. Tonahill, Notary Public in and for Jasper County, Texas.

[fol. 25] EXHIBIT "F" TO APPLICATION

IN THE SUPREME COURT OF TEXAS

No. —

EX PARTE JOE J. FISHER

THE STATE OF TEXAS,
County of Jasper:

Before Me, Joe H. Tonahill, a Notary Public in and for Jasper County, Texas, on this day personally appeared J. R. Lane, who being by me duly sworn upon oath, says:

"I was present in the District Court of Jasper County, Texas, on June 17, 1947, about 9:30 A. M., when Mr. Joe J. Fisher was making his opening argument in the case of Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075. I heard all the remarks made by Judge Adams and Mr. Fisher at the time Judge F. P. Adams

declared Mr. Fisher to be in contempt of court and fined him $100.00 and three days in jail. Mr. Fisher did not do or say anything which was disrespectful or undignified. He did not demonstrate any anger or temper. He did not raise his voice at any time he was talking to Judge Adams and did not talk in a discourteous or insulting manner, and did nothing which I would consider conduct unbecoming a gentleman. I did not see or hear Mr. Fisher say or do anything that would have reasonably caused Judge Adams to become so upset and excited and apparently lose all self-control.

(S.) J. R. Lane.

Subscribed and sworn to before me by the above affiant this the 23rd day of June, A. D. 1947, to certify which witness my hand and seal of office. (S.) Joe H. Tonahill, Notary Public in and for Jasper County, Texas. (Seal.)

[fol. 26] EXHIBIT "G" TO APPLICATION

IN THE SUPREME COURT OF TEXAS

No. —

EX PARTE JOE J. FISHER

THE STATE OF TEXAS,
County of Jasper:

Before Me, Joe H. Tonahill, a Notary Public in and for Jasper County, Texas, on this day personally appeared J. L. Wilkinson, who, being by me duly sworn upon oath, says:

"I was present in the District Court of Jasper County, Texas, on June 17, 1947, about 9:30 A. M., when Mr. Joe J. Fisher was making his opening argument in the case of Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075. I heard all the remarks made by Judge Adams and Mr. Fisher at the time Judge F. P. Adams declared Mr. Fisher to be in contempt of court and fined him $100.00 and three days in jail. Mr. Fisher did not do or say anything which was disrespectful or undignified. He

did not demonstrate any anger or temper. He did not raise his voice at any time he was talking to Judge Adams and did not talk in a discourteous or insulting manner, and did nothing which I would consider conduct unbecoming a gentleman. I did not see or hear Mr. Fisher say or do anything that could have reasonably caused Judge Adams to become so upset and excited and apparently lose all self-control.

(S.) J. L. Wilkerson.

Subscribed and sworn to before me by the above affiant this the 23rd day of June, A. D. 1947, to certify which witness my hand and seal of office. (S.) Joe H. Tonahill, Notary Public in and for Jasper County, Texas. (Seal.)

[fol. 27] EXHIBIT "H" TO APPLICATION

IN THE SUPREME COURT OF TEXAS

No. —

EX PARTE JOE J. FISHER

THE STATE OF TEXAS,
County of Jasper:

Before Me, Joe H. Tonahill, a Notary Public in and for Jasper County, Texas, on this day personally appeared C. T. Boynton, who being by me duly sworn upon oath, says:

"I was present in the District Court of Jasper County, Texas, on June 17, 1947, about 9:30 A. M., when Mr. Joe J. Fisher was making his opening argument in the case of Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075. I heard all the remarks made by Judge Adams and Mr. Fisher at the time Judge F. P. Adams declared Mr. Fisher to be in contempt of court and fined him $100.00 and three days in jail. Mr. Fisher did not do or say anything which was disrespectful or undignified. He did not demonstrate any anger or temper. He did not raise his voice at any time he was talking to Judge Adams

and did not talk in a discourteous or insulting manner, and did nothing which I would consider conduct unbecoming a gentlemen. I did not see or hear Mr. Fisher say or do anything that could have reasonably caused Judge Adams to become so upset and excited and apparently lose all self-control.

(S.) Chas. Boynton.

Subscribed and sworn to before me by the above affiant this the 21st day of June, A. D. 1947, to certify which witness my hand and seal of office. (S.) Joe H. Tonahill, Notary Public in and for Jasper County, Texas. (Seal.)

[fol. 28] EXHIBIT "I" TO APPLICATION

IN THE SUPREME COURT OF TEXAS

No. —

EX PARTE JOE J. FISHER

THE STATE OF TEXAS,
County of Jasper:

Before Me, Evalena Moore, a Notary Public in and for Jasper County, Texas, on this day personally appeared Joe H. Tonahill, of Jasper, Texas, who, being by me duly sworn upon oath, says:

On June 17, 1947, I was sitting in the District Court of Jasper County, Texas, on the occasion when Joe J. Fisher was presenting his oral argument to the jury in behalf of Anderson Godfrey, plaintiff in a Workmen's Compensation case against the Texas Indemnity Insurance Company. At about 9:30 o'clock A. M. on this occasion, Mr. Fisher was undertaking to make some statements pertaining to the Workmen's Compensation Law as it applied to the facts in issue when an objection was levelled to one of his statements by Attorney Joyce Cox for the defendant, which objection was sustained by the Court (Hon. F. P. Adams, presiding). Mr. Fisher undertook to explain his position to the Court,

but was immediately told by the Court not to argue with him, but to go ahead, that he could have his exception, which exception was preserved by Mr. Fisher. Mr. Fisher continued his argument and another objection was levelled to his argument by Mr. Cox, which was sustained by the Court, upon which action Mr. Fisher attempted to make an explanation and stated "I am asking—", at which time he was interrupted by the Court, who said, "Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher". Upon which action Mr. Fisher stated to the Court that he thought that he had a right to explain whether the plaintiff was suffering from a specific [fol. 29] or a general injury. Following this statement, the Court made the statement that he would declare a mistrial if Mr. Fisher messed with him two minutes and a half, and fine him besides. In response to this statement, Mr. Fisher stated that he would take an exception to the conduct of the Court. The Court then fined him $25.00. Mr. Fisher was then fined $50.00 by the Court and when told to pay the Clerk $50.00, Mr. Fisher said, "You mean for trying to represent my client?" The Court replied, "No, sir; for contempt of court. Don't argue with me", at which time Mr. Fisher stated to the Court that he was making no effort to commit contempt, but merely trying to represent the plaintiff. At this time the Sheriff was orally ordered to take Mr. Fisher out of the courtroom and he was fined $100.00 and three days in jail.

"Mr. Fisher was taken to the Jasper County Jail immediately under the oral instructions of the Court prior to any formal or written order of any nature having been rendered and entered by the Court, and prior to any formal or written commitment having been issued pursuant to the Court's direction addressed to the Sheriff to arrest Mr. Fisher and restrain him of his liberty, in accordance with any order of contempt. Mr. Fisher was taken to the Jasper County Jail, where he remained continuously in restraint of his liberty until about 4:50 P. M., June 17, 1947, at which time he was released under a $500.00 bond, in accordance with information received by Sheriff R. C. Pace from Hon. Geo. H. Templin, Clerk of the Supreme Court of Texas. At no time did Mr. Fisher ever leave the Jasper County Jail during his incarceration. At no time during

that day had Mr. Fisher reappeared before the presence of the Court following the incident which occurred at 9:30 A. M. on June 17.

It is impossible for me to interpret to any degree any disrespect or gross disrespect of the Court on Mr. Fisher's part, nor can I visualize any disrespect or gross disre- [fol. 30] spect by Mr. Fisher of the Court's orders and its authority on the occasion in question. Nor did Mr. Fisher willfully interrupt or interrupt the business of the Court and impair the respect to its authority. It is impossible for me to conceive that an argument ever took place with the Court by Mr. Fisher. Mr. Fisher in no wise ever manifested disrespect for the Court, its authority and its orders. Mr. Fisher demeaned himself with dignity, respect and gentility that becomes an officer of the Courts of our State at all times. He never at any time raised his voice or spoke in immoderate tones or displayed temperament, anger or resentment in his address to the court. It is difficult to conceive with what considerations the Court was motivated in holding Mr. Fisher in contempt, because Mr. Fisher never placed himself outside the bounds of dignity and respect which an attorney owes courts of law.

Immediately following Mr. Fisher's removal from the Court, the Court turned to the counsel table and made the statement to myself, as co-counsel for Anderson Godfrey, and to Messrs. Joyce Cox, T. Gilbert Adams, and John Seaman, counsel for the Texas Indemnity Insurance Company, that he would just go ahead and submit the case to the jury without any further argument. I immediately nodded my assent to the Court's decision. Then Mr. Cox approached the bench and made some statement to the Court, which was inaudible, and immediately following this statement the Court declared a mistrial in the cause."

(S.) Joe H. Tonahill.

Subscribed and sworn to before me by the above affiant this the 28th day of June, A. D. 1947, to certify which witness my hand and seal of office. (S.) Evalena Moore, Notary Public in and for Jasper County, Texas. (Seal.)

[fol. 31] EXHIBIT "J" TO APPLICATION

THE STATE OF TEXAS,
County of Jasper:

On this the 17th day of June, A. D. 1947, during the argument of counsel in the case of Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075 in the District Court of Jasper County, Texas, the Court instructed the attorney for plaintiff, Joe J. Fisher, not to proceed further in the manner in which he was arguing the case and he continued and the Court assessed a fine of $25.00; he continued in his discussion and the Court raised the fine to $50.00; and on further discussion he still refused to recognize the Court's authority or orders and the Court fined him $100.00, and he still persisted in his efforts and the Court assessed his fine at three days' confinement in the county jail in addition to the $100.00 fine, for contempt of court.

F. P. Adams, Judge, 1st Judicial District of Texas.

Endorsement: Filed June 17, 1947, at 9:40 A. M. by Mrs. T. B. Prewitt, District Clerk of Jasper County, Texas.

[fol. 32] THE STATE OF TEXAS,
County of Jasper:

I, Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas, hereby certify that the above and foregoing is a true and correct copy of original Judgment of Contempt in the presence of the Court in Cause No. 4075, styled Anderson Godfrey vs. Texas Indemnity Insurance Company as same appears of record in Vol. 0, page 605, of the Civil Minutes of the District Court of Jasper County, Texas.

Given under my hand and seal of office at Jasper, Texas, this the 26th day of June, A. D. 1947.

(S.) Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas. (Seal.)

[fol. 33] EXHIBIT "K" TO APPLICATION

THE STATE OF TEXAS,

To the Sheriff or Any Constable of Jasper County, Texas, Greetings:

Whereas, on the 17th day of June, 1947, in the District Court of Jasper County, in a matter entitled Anderson Godfrey vs. Texas Indemnity Insurance Company, No. 4075, the Hon. F. P. Adams, District Judge, held that Joe J. Fisher was in contempt of the District Court of Jasper County and punished him therefor by imposing a fine of $100.00 and confinement in the county jail of Jasper County for a period of three days, a copy of which Amended Judgment is hereto attached, marked "Exhibit A" and made a part hereof;

Now, therefore, you are commanded to take the body of the said Joe J. Fisher and safely keep him in custody in the county jail of Jasper County for a period of three days and until the fine of $100.00 is paid to the District Clerk of Jasper County, Texas, for the use of the State of Texas.

Witness the Hon. F. P. Adams, Judge of the District Court of Jasper County, Texas, at the Courthouse of said county in Jasper, Texas, this the 17th day of June, 1947.

(S.) Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas. (Seal.)

Issued this the 17th day of June, 1947.

(S.) Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas. (Seal.)

[fol. 34] IN THE DISTRICT COURT OF JASPER COUNTY, TEXAS

No. 4075

ANDERSON GODFREY

vs.

TEXAS INDEMNITY INSURANCE COMPANY

On this the 17th day of June, A. D. 1947, at the hour of 9:30 o'clock A. M., the Court being in session in the cause of Anderson Godfrey vs. Texas Indemnity Insurance

Company being then on trial, Joe J. Fisher, the attorney for the Plaintiff in said cause, was making his opening argument to the jury in said cause and to such argument the attorney for the Defendant, Joyce Cox, objected and such objections were sustained by the Court and the attorney Joe J. Fisher was instructed to refrain from further argument of the nature objected to, as is hereinafter set out:

Opening argument to jury of Plaintiff's Attorney, Joe J. Fisher

Now, bear in mind, gentlemen, that this is what we call a specific injury. A general injury is an injury to the entire body. This is what is known as a specific injury, and it is confined to the left foot. We have specific injuries where you have injuries to the eye, to your hand, and to your foot; this is an injury to the foot, to the left foot; and the law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. That is the most compensation Anderson Godfrey could receive, would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate.

[fol. 35] By Mr. Cox: Your Honor please——

By the Court: Wait a minute.

By Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

By the Court: That has all been agreed upon.

By Mr. Fisher: I think it is material, Your honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

By the Court: They are not interested in dollars and cents.

By Mr. Fisher: They are interested to this extent——

By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

By Mr. Fisher: Note our exception.

By the Court: All right.

This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.

By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.

By Mr. Fisher: I am asking——

By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

[fol. 36] By Mr. Fisher: That is all right. We take exception to the conduct of the Court.

By the Court: That is all right; I will fine you $25.00.

By Mr. Fisher: If that will give you any satisfaction.

By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the Clerk $50.00.

By Mr. Fisher: You mean for trying to represent my client?

By the Court: No, sir; for contempt of Court. Don't argue with me.

By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument——

By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.

By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.

By the Court: That will be a hundred dollar fine and three days in jail. Take him out.

By Mr. Fisher: I demand a right to state my position before the audience.

By the Court: Don't let him stand there. Take him out.

And the Court having ruled that said argument was improper and having ordered the said Joe J. Fisher to refrain from making same he, the said Joe J. Fisher, then in the

immediate view and presence of the Court and Jury continued to make such argument in gross disrespect of the [fol. 37] Court, its orders and its authority and did thereby willfully interrupt the business of the Court and impair the respect to its authority, and the said Joe J. Fisher was forcibly removed from the Court by Deputy Sheriff Martel Mixon, and the said Joe J. Fisher being now still present, it is Ordered and Adjudged that he, the said Joe J. Fisher, is guilty of contempt of Court in so refusing to abide the ruling of the Court and in arguing with the Court and in manifesting disrespect for the Court, its authority and its orders; and it is further Adjudged that the said Joe J. Fisher as his punishment for said contempt be imprisoned in the jail of the County of Jasper for the term of three days and pay a fine to the Clerk for the use of the State of Texas in the sum of $100.00 and that he, the said Joe J. Fisher be committed to the jail of said Jasper County until said fine is paid or until he be discharged therefrom according to law; for which let warrant of commitment accompany a certified copy of this amended judgment for further authority issue.

F. P. Adams, Judge, 1st Judicial District of Texas.

[fol. 38] The State of Texas,
County of Jasper:

I, Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas, do hereby certify that the above and foregoing is a true and correct copy of Amended Judgment of Contempt in the presence of the court, in cause No. 4075, styled Anderson Godfrey vs. Texas Indemnity Insurance Co., as same appears on file in the District Clerk's office, Jasper County, Texas.

Given under my hand and seal of office at Jasper, Texas, this the 17th day of June, A. D. 1947.

(S.) Mrs. T. B. Prewitt, Clerk, District Court, Jasper County, Texas. (Seal.)

Endorsed: Filed June 17, 1947, at 3:55 o'clock P. M., Mrs. T. B. Prewitt, District Clerk, Jasper County, Texas.

[fol. 39] THE STATE OF TEXAS,
County of Jasper:

I, Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas, do hereby certify that the above and foregoing is a true and correct copy of:

1. Order of Commitment;
2. Certified Copy of Amended Judgment of Contempt in the Presence of the Court;
3. Sheriff's Return,

in cause No. 4075, styled Anderson Godfrey vs. Texas Indemnity Insurance Company, as same appears on file in the District Clerk's office of Jasper County, Texas.

Given under my hand and seal of office at Jasper, Texas, this the 26th day of June, A. D. 1947.

(S.) Mrs. T. B. Prewitt, Clerk of the District Court of Jasper County, Texas. (Seal.)

[fol. 40] EXHIBIT "L" TO APPLICATION

Western Union

1947 Jun 17 PM 4 01

DA46
D.BHA47 1 PD-Jasper Tex 17 340P
Looney and Clark Attorneys—
Brown Bldg Austin Tex—

I hold Joe J. Fisher in custody for contempt of court ordered by Judge F. P. Adams no writ of commitment has been issued or delivered to me and I hold him under oral direction to me by the judge to do so—

R. C. Pace, Sheriff, Jasper County, Texas.

[fol. 41] IN SUPREME COURT OF TEXAS

WRIT OF HABEAS CORPUS—Filed June 17, 1947

No. A-1328.

EX PARTE JOE FISHER

Original Habeas Corpus Proceeding

The petition for writ of habeas corpus in the above entitled case is granted, and the Clerk will issue the writ of habeas corpus prayed for, returnable July 9th, 1947, at nine A. M. The Relator will be admitted to bail upon the giving of a good and sufficient bond, conditioned as required by law, in the sum of Five Hundred Dollars ($500.00), to be approved by the Sheriff of Jasper County, Texas, pending the hearing on the return date, and until otherwise ordered by the Supreme Court.

Witness my hand this the 17th day of June, 1947.

James P. Alexander, Chief Justice, The Supreme Court of Texas.

Filed in Supreme Court of Texas. June 17, 1947. Geo. H. Templin, Clerk.

[fol. 42] ORDER OF COURT IN CHAMBERS

No. A-1328

EX PARTE JOE J. FISHER

On Writ of Habeas Corpus

June 17, 1947.

To the Sheriff of Jasper County, Greeting:

Whereas, Joe J. Fisher has made application to the Honorable Supreme Court of the State of Texas, for the writ of Habeas Corpus, alleging that he is illegally restrained of his liberty by you in said Jasper County, Texas, by virtue of a writ of commitment ordered by the District Judge in and for said County:

Whereas, the Honorable James P. Alexander, Chief Justice, granted said application and ordered said writ of Habeas Corpus to issue in the following words:

"The petition for writ of habeas corpus in the above entitled case is granted, and the Clerk will issue the writ of habeas corpus prayed for, returnable July 9th, 1947, at Nine A. M. The Relator will be admitted to bail upon the giving of a good and sufficient bond, conditioned as required by law, in the sum of Five Hundred Dollars ($500.00), to be approved by the Sheriff of Jasper County, Texas, pending the hearing on the return date, and until otherwise ordered by the Supreme Court.

"Witness My Hand this the 17th day of June, 1947.

(S.) James P. Alexander, Chief Justice, The Supreme Court of Texas."

Now Therefore, you are hereby commanded to produce the body of the applicant, Joe J. Fisher, before the Supreme Court of the State of Texas, at Austin, on July 9th, 1947, at Nine O'Clock A. M., unless you take the bond of the applicant in the sum of Five Hundred ($500.00) Dollars in the terms and conditions of the law, that he will appear and abide by the decision of the Supreme Court of the State of Texas, which bond you will approve in your official capacity and forward to the Clerk of this Court.

These Are Therefore to Command You to obey the foregoing and in all things Herein Fail Not under the penalties prescribed by law.

Witness, The Hon. James P. Alexander, Chief Justice of said Supreme Court of Texas, with the seal thereof annexed, at the City of Austin, this the 17th day of June, A. D. 1947.

Geo. H. Templin, Clerk of the Supreme Court of Texas, by —— ——, Deputy. (Seal.)

[fol. 43] IN SUPREME COURT OF TEXAS

SHERIFF'S RETURN

THE STATE OF TEXAS,
County of Jasper:

June 19, 1947.

Honorable Geo. H. Templin, Clerk, Supreme Court of Texas,
Austin, Texas.

Re: Ex Parte JOE J. FISHER

On Writ of Habeas Corpus

DEAR SIR:

In Compliance with the order of the Supreme Court of Texas, in the above matter, I have taken the bond of Joe J. Fisher as directed in your order and enclose the same herewith to you after having been approved by me.

I have retained the certified copy of the order for my files. If I am in error in retaining the copy, please advise me and it will be returned to you by return mail.

Yours very truly, R. C. Pace, Sheriff, Jasper County, Texas, by Thos. M. Mixon, Deputy.

TMM:dw.
Encl.

[fol. 44] No. A-1328

THE STATE OF TEXAS,
County of Jasper:

Know all men by these presents: That we, Joe J. Fisher, as principal, and C. V. Lindsey and W. L. Neal, as sureties, are held and firmly bound unto the State of Texas in the penal sum of $500.00, for the payment of which sum well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and dated on this the 17 day of June, A. D. 1947.

The condition of the above obligation is such that whereas the above bound principal, Joe J. Fisher, being in the

custody of R. C. Pace, Sheriff of Jasper County, Texas, charged with having committed the offense of contempt of court in the District Court of Jasper County, Texas, on June 17, 1947, and whereas, the said Joe J. Fisher has obtained from Chief Justice James P. Alexander, presiding over the Supreme Court of Texas, a Writ of Habeas Corpus, returnable before the said Judge and/or the Court, and which said Writ has been duly returned and is now pending before said Judge and/or Court.

Now, therefore, we, Joe J. Fisher, as principal, and C. V. Lindsey and W. L. Neal, as sureties, acknowledge ourselves bound to pay to the said Supreme Court of Texas the sum of $500.00, condition that said Joe J. Fisher shall prosecute his Writ of Habeas Corpus forthwith and speedily with effect, and in case the judgment of the Supreme Court of Texas shall be against him, he shall perform its judgment, sentence or decree and pay all such damages, fines and perform such sentences as said court may award against him; and if the said Joe J. Fisher shall well and truly make his [fol. 44½] personal appearance before said Chief Justice James P. Alexander, and/or the Supreme Court of Texas, at Austin, Texas, as ordered or to be ordered, and there remain from day to day pending the examination and hearing of said Writ of Habeas Corpus and until the final determination thereof, then this obligation shall be void; otherwise to remain in full force and effect.

(S.) Joe J. Fisher. C. V. Lindsey. W. L. Neal.

Approved on this 17 day of June, A. D. 1947.

(S.) R. C. Pace, Sheriff, Jasper County, Texas.

Endorsed: Ex Parte Joe J. Fisher. Bail Bond Pending Writ of Habeas Corpus. Filed in Supreme Court of Texas, June 20, 1947. Geo. H. Templin, Clerk.

[fol. 45] IN THE SUPREME COURT OF TEXAS

No. A-1328

EX PARTE JOE FISHER

On Writ of Habeas Corpus

OPINION—Filed November 12, 1947

This is an original habeas corpus proceeding in which the relator, Honorable Joe Fisher, seeks his release from an order of the district court of Jasper County, adjudging him in contempt of court, assessing a fine of $100 and a jail sentence of three days, and committing him to the custody of the sheriff.

The contempt order arose in the trial of a workmen's compensation suit in which the relator was attorney for the claimant. The suit was by Anderson Godfrey, claimant, against the Texas Indemnity Corporation for compensation for injuries to claimant's left foot. His weekly wage rate and the compensation due per week were agreed upon by the parties. The only issues remaining in controversy were those with reference to the extent and duration of the injury, and these were submitted to the jury. These issues inquired: (1) if the claimant sustained total incapacity; (2) when the total incapacity, if any, began; (3) how long it has or will continue; (4) whether claimant sustained a partial loss of the use of his foot; (5) when the partial loss of use, if any, began or will begin; (6) how long the partial loss of use, if any, has continued or will continue; and (7) what was the extent or degree of partial loss of use, if any. In the first portion of the charge the trial court gave the usual admonitory instructions to the jury, among which were that the jurors would receive the law from the court as contained in the charge and that they must not discuss what effect any of their answers should have upon the rights of the parties nor of the judgment to be rendered by [fol. 46] the court. Thereafter, the court defined "Preponderance of the evidence", "Natural result", "Injury", "Total incapacity", and "Partial loss of use".

During his opening argument to the jury the relator began to explain the difference between a general injury

and a specific injury, and stated that claimant's injury was a specific injury to his left foot for which the maximum compensation provided by law was one hundred and twenty-five weeks. He continued: "That is the most compensation Anderson Godfrey could receive, would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate."

At this point Honorable Joyce Cox, counsel for the insurance company, objected because the jury was not concerned with the computation since such issues were not submitted. Thereupon, the following discourse occurred in open court:

"By the Court: That has all been agreed upon.

"By Mr. Fisher: I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

"By the Court: They are not interested in dollars and cents.

"By Mr. Fisher: They are interested to this extent——

"By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

"By Mr. Fisher: Note our exception.

"By the Court: All right.

"By Mr. Fisher: This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.

"By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

"By the Court: Gentlemen. Mr. Fisher, you know the rule, and I have sustained his objection.

"By Mr. Fisher: I am asking——

"By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

"By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

"By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

"By Mr. Fisher: That is all right. We take exception to the conduct of the Court.

"By the Court: That is all right; I will fine you $25.00.

"By Mr. Fisher: If that will give you any satisfaction.

[fol. 47] "By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the Clerk $50.00.

"By Mr. Fisher: You mean for trying to represent my client?.

"By the Court: No, sir, for contempt of Court. Don't argue with me.

"By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument——

"By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.

"By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.

"By the Court: That will be a hundred dollar fine and three days in jail. Take him out.

"By Mr. Fisher: I demand a right to state my position before the audience.

"By the Court: Don't let him stand there. Take him out."

The above proceedings occurred in open court at 9:30 A. M. on June 7, 1947. Ten minutes later there was filed with the district clerk an order of contempt which was signed by the trial judge. No commitment was issued on that order. However, the sheriff held the relator upon the verbal order of the trial court until an amended order was filed between three and four o'clock P. M., of the same day. This amended order contained a full recitation of the above proceedings and was accompanied by a formal commitment. That order and commitment were in effect at the time we issued our temporary writ of habeas corpus, and it is upon these latter instruments that we base our decision.

In a habeas corpus proceeding of this character this court has only limited powers. The inquiry before us is whether or not a citizen is restrained of his liberty without due process of law. In determining this matter we are restricted

to the question of jurisdiction, the lack of which would render the judgment void. In passing on the court's authority we look to the jurisdiction of the subject matter involved in the alleged contempt, jurisdiction of the person, and the power of the court to render the particular [fol. 48] judgment. Whether he committed the act charged is conclusively determined by the order or judgment of the trial court in the proceeding wherein he is adjudged in contempt, provided that court possessed jurisdiction. We may consider the facts only for the purpose of determining whether they constituted acts sufficient to confer jurisdiction upon the court to make the particular order. Ex parte Testard, 101 Texas 250, 106 S. W. 319; Ex parte Olson, 111 Texas 601, 243 S. W. 773; Ex parte Lipscomb, 111 Texas 409, 239 S. W. 1101; Ex parte Duncan, 127 Texas 507, 95 S. W. 2d 675; Ex parte Hughes, 133 Texas 505, 129 S. W. 2d 270; Ex parte Genecov, 143 Texas 476, 186 S. W. 2d 225, 160 A. L. R. 1099; Ex parte Norton, 144 Texas 445, 191 S. W. 2d 713; Ex parte Dulaney, — Texas —, 203 S. W. 2d 203; 25 Am. Jur. 212, Sec. 92; 39 C. J. S. 539-545, Sec. 36.

In the Testard case, supra, in discussing our powers in proceedings of this character, this court said:

> "This is not an appeal from the judgment of the district court, but an application for the release of the relator, which can be sustained only by making it appear that the judgment is void. * * * The judgment, therefore, is valid against collateral attack, and no amount of evidence offered before this court, tending to show that the relator was in fact innocent of the charge, can now avail him. The question of his guilt or innocence was for the trial court, and was concluded by its judgment pronounced after a hearing."

That particular language from Judge Williams was quoted with express approval by this court in both the Duncan and Norton cases, supra, wherein in each case similar rules of law were applied.

With these principles in mind we must determine whether the conduct of the relator was such as to invoke the jurisdiction of the court to enter the particular order herein involved. In passing on this question we must consider [fol. 49] the proceedings as a whole and not merely isolated portions thereof. If there is any conduct or behavior of the

relator contained in the whole proceedings sufficient to constitute a contempt which was within the power of the court to punish, our inquiry comes to an end. Of course, if from our examination of the entire proceedings it appears that the trial court exceeded its powers in making the order which the relator disobeyed or where the act charged was not one which it had the power to punish as a contempt, the alleged misconduct would not as a matter of law constitute a contempt, and the relator would be entitled to be discharged.

From the judgment of contempt it appears, as above indicated, that the relator began to explain to the jury that his client had suffered a specific injury to his foot for which he stated that the maximum compensation provided by law was one hundred and twenty-five weeks. He further informed the jury that such amount was all his client was asking, which he said meant "one hundred and twenty-five weeks times the average weekly compensation rate." Objection was made to that argument on the ground that the jury was not concerned with the computation since those issues were not submitted. The objection was sustained. The relator responded that he thought it was material "to tell the jury what the average weekly compensation is of this claimant so they can tell where he is." The court replied that the jury was not interested in dollars and cents, and for counsel to go ahead and reserve his exception. Notwithstanding the specific orders of the court, and apparently in defiance thereof, the relator repeated to the jury that his client could recover only "one hundred and twenty-five weeks compensation at whatever compensation the rate will figure under the law." Objection was again made, and the court admonished the relator of his knowledge of the rule and of the fact that the objection to the argument had [fol. 50] theretofore been sustained. Then there ensued that unfortunate and regrettable dialogue between the relator and the trial judge which resulted in the infliction of punishment against the relator.

It is obvious that the relator was attempting to inform, and did inform, the jury what the law is with reference to the rights of his client, which was calculated to inform them of the legal effect and result of their answers to the issues submitted. That such conduct and practice is to be condemned under our law of submitting cases upon special is-

sues, cannot be doubted, unless, unlike the circumstances in the court below, the issues are such that men of ordinary intelligence would be presumed to know the legal effect of their answers. Galveston, H. & S. A. Ry. Co. v. Harling, Tex. Com. App., 260 S. W. 1016; McFaddin v. Hebert, Tex. Com. App., 15 S. W. 2d 213; City of Dallas vs. Firestone Tire & Rubber Co., 66 S. W. 2d 729, writ refused. As was said in the McFaddin case, supra, "the prime object, purpose, and intent of the law for submitting cases on special issues is to remove the jury from any bias in favor of, or prejudice against, either party to the suit, to relieve them from the duty of directly passing on who shall prevail in the suit, and to make it the duty of the jury to answer each question truly as they find the facts to be from the evidence, without regard to what the results of their answers may be."

In keeping with the purpose and spirit of the law of special issues, Rule 269, T. R. C. P., provides that arguments on questions of law shall be addressed to the court, and [fol. 51] arguments on the facts should be addressed to the jury. It also provides that counsel shall be required to confine the argument strictly to the evidence and the arguments of opposing counsel.

In Ramirez v. Acker, 134 Texas 647, 138 S. W. 2d 1054, 1055, this court had this to say with reference to the scope of legitimate argument before the jury:

> "The rule has long been in force in this State that 'counsel shall be required to confine argument strictly to the evidence and to the argument of opposing counsel.' See Rule 39, relating to district and county courts. The scope of argument by counsel to the jury is always under the supervision of the court. It is the duty of the court to maintain decorum during the trial of a case, and to require counsel to limit argument to the facts in evidence. Great latitude is allowed counsel in discussing the facts and issues. Counsel are permitted to show the environments of the case; they may comment upon the bias or interests of the parties and witnesses, and may discuss the reasonableness or unreasonableness of the evidence and its probative effect or lack of probative effect; but such latitude extends only to the facts and issues raised by the evidence in the case. It is only by adhering strictly to this rule that

the rights of litigants can be protected and the law administered justly and impartially."

Measured by these rules it appears obvious to us that the above argument and conduct of counsel was peculiarly within the control, direction and jurisdiction of the trial court. It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice. Consequently, we hold that the [fol. 52] court acted clearly within its jurisdiction and, therefore, the judgment of contempt cannot be impeached in this collateral proceeding.

The order granting the temporary writ of habeas corpus is set aside, and the relator is remanded to the custody of the sheriff of Jasper County to carry out the judgment of the trial court.

Per Curiam.

Endorsed: No. A-1328. In the Supreme Court of Texas. Ex Parte Joe Fisher. On Writ of Habeas Corpus. Writ Denied, and Relator remanded to custody of Sheriff of Jasper Co., Texas.

[File endorsement omitted.]

[fol. 53] IN THE SUPREME COURT OF THE STATE OF TEXAS

No. A-1328

Ex Parte JOE J. FISHER

DISSENTING OPINION—November 12, 1947

A question highly important to the bench, bar, and litigants is involved in this case. If, based upon the facts of this case, the majority opinion becomes the settled law of this State, then a trial judge by the exercise of arbitrary power could prevent an attorney from representing his client in a case on trial according to the duty which he owes his client.

The question for determination by this Court is whether the undisputed facts embraced in this record show that the trial judge was justified in finding relator guilty of contempt, and whether he was authorized to enter judgment for contempt for relator's conduct and acts.

The facts upon which the trial judge based his judgment for contempt are now before this Court. In order to clearly present the facts upon which the trial judge entered judgment, I quote, supplemental to the facts embraced in the majority opinion, the following from relator's brief:

"In this case Relator was engaged in the argument of a workmen's compensation case before a jury. After stating to the jury that the injury involved was a specific injury, the Relator continued:

> " 'the law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. That is the most compensation Anderson Godfrey could receive, would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate.'

[fol. 54] "At this point Relator was interrupted by Mr. Joyce Cox, one of the opposing counsel—the opposing counsel consisting of Mr. Cox, Mr. John G. Seaman, and the trial judge's son, Mr. T. Gilbert Adams—and the following discussion ensued:

(I omit certain facts embraced in the majority opinion.)

"In his original judgment of contempt, the trial judge stated that:

"'The Court instructed the attorney for plaintiff, Joe J. Fisher, not to proceed further in the manner in which he was arguing the case and he continued and the Court assessed a fine of $25.00; he continued in his discussion and the Court raised the fine to $50.00; and on further discussion he still refused to recognize the Court's authority or orders and the Court fined him $100.00; and he still persisted in his efforts and the Court assessed his fine at three days' confinement in the county jail in addition to the $100.00 fine, for contempt of court.'

"In his so-called 'amended order,' the trial judge stated that:

"'And the Court having ruled that said argument was improper and having ordered the said Joe J. Fisher to refrain from making same he, the said Joe J. Fisher, then in the immediate view and presence of the Court and jury continued to make such argument in gross disrespect of the Court, its orders and its authority and did thereby willfully interrupt the business of the Court and impair respect to its authority, and the said Joe J. Fisher was forcibly removed from the Court by Deputy Sheriff Martel Mixon, and the said Joe J. Fisher being now still present, it is Ordered and Adjudged that he, the said Joe J. Fisher, is guilty of contempt of Court in so refusing to abide the ruling of the Court and in arguing with the Court and in manifesting disrespect for the Court, its authority and its orders; and it is further Adjudged that the said Joe J. Fisher as his punishment for said contempt be imprisoned in the jail of the County of Jasper for the term of three days and pay a fine to the Clerk for the use of the State of Texas in the sum of $100.00 and that he, the said Joe J. Fisher be committed to the jail of said Jasper County until said fine is paid or until he be discharged therefrom according to law.'"

In the order of the court it appears that the acts of relator on which the judge based his contempt order occurred before the court at 9:30 o'clock A. M. on June 7, 1947, at which

time the original order was made; and the sheriff held relator under a verbal order of the trial court under such original order. The amended judgment was filed with the clerk at 3:25 o'clock P. M. on June 17, 1947. The sheriff's [fol. 55] return shows that he received the order of commitment based upon the amended order at 3:45 o'clock P. M. on June 17, 1947, and executed it at the same time. The sheriff's telegram, which was before this Court at the time the writ of habeas corpus was granted, shows that it was sent from Jasper at 3:40 o'clock P. M. on June 17, 1947, and was received at Austin at 4:01 o'clock P. M. on the same day, and it shows that the sheriff held relator in custody at that time under verbal direction of the court and no writ of commitment had been issued or delivered. The telegram reads as follows:

> "I hold Joe J. Fisher in custody for contempt of court ordered by Judge F. P. Adams. No writ of commitment has been issued or delivered to me and I hold him under oral direction to me be [by] the judge to do so."

The writ of habeas corpus was granted by this Court under Article 1737, Revised Civil Statutes, on June 17, 1947, but the hour at which it was granted is not shown in the record. I shall assume that both orders were filed before the writ of habeas corpus was granted by this Court.

Relator vigorously attacks the judgment of contempt entered in this case, substantially on the following grounds:

1. As a matter of law relator was not guilty of contempt.

2. The uncontroverted facts clearly show that relator was not guilty of contempt.

3. Relator is entitled to be released because of the absence of a valid order of contempt or commitment thereunder.

[fol. 56] In this State is has ben held "that in order to justify the court to fine for contempt three things are necessary: (1) Jurisdiction of the subject matter; (2) jurisdiction of the person; and (3) the authority of the court to render the particular judgment. 9 Tex. Jur., p. 641, and cases cited." Ex parte Britton, 127 Tex. 85, 92 S. W. 2d 224; Ex parte Duncan, 127 Tex. 507, 95 S. W. 2d 675.

The courts were created for the principal purpose of furnishing litigants a tribunal in which to present their

claims and settle their disputes in accordance with law and justice. Litigants are entitled to be represented by attorneys of their own choice. It is well known that rules relating to procedure in the trial of cases are complicated. It is also true that certain cases, especially those concerning the Workmen's Compensation Law, present serious problems, not only for the court, but also for the attorneys and the jury. The right of an attorney to appear and represent his client is well fixed in the jurisprudence of this State. An attorney is an officer of the court, and the relationship between the court and attorneys is reciprocal. In their respective spheres they both have certain rights, and the rights of the one should be recognized and respected by the other. It is the duty of a judge to preside in the trial of a case and conduct his court in a proper and orderly manner, and it is the duty of an attorney representing a litigant to present his client's interest to the court and to the jury. This is essential if courts are to function and administer justice in an orderly manner. A judge should conduct himself in a dignified manner, and see that all parties are treated impartially and that the law and justice are administered without bias or favor. It is only in rare instances that this rule is violated. An attorney should be respectful [fol. 57] to the judge and his rulings, and if he should abuse this duty, he should be adjudged in contempt.

It is our boast that our courts and our attorneys are and should be independent. It has been aptly said that, "The independence of the bar is the only unfailing safeguard of justice, and of that liberty without which justice is but a name." An attorney would not be true to his profession and his duty to his client if he did not present his client's cause to the court and the jury with all the ability that he possesses. In doing so he is merely living up to the traditions of his profession. This right should not be taken from an attorney or a client except for good cause shown.

Contempts of court are classed as constructive or direct. Constructive contempt is tested by acts or words outside the presence of the court; and direct contempt consists of words spoken or acts committed in the presence of the court. 12 Amer. Jur., p. 390, § 4.

This case is for direct contempt of the trial court. The recent case of Ex parte Norton, 144 Tex. 445, 191 S. W. 2d 713, involved a judgment of direct contempt, entered

by the trial court against an attorney, and in passing on the authority of the judge to enter the judgment this Court said:

> "In ascertaining whether the acts and conduct of relator in the presence of the court justified the court in holding him guilty of contempt, we must take into consideration all of the facts and circumstances concerning this case. The case was pending before the judge for determination, and he had jurisdiction of the cause and the parties thereto."

It was also further said:

> "In the judgment, the judge specified the acts and conduct of relator which caused him to hold relator in contempt of court and issue the commitment. It is quite plain from the record that relator knew that the judge felt that his orders were being disobeyed, and he also knew that the judge considered that relator, by his conduct and improper remarks, was disrespectful con- [fol. 58] cerning the dignity and authority of the court. Relator in open court expressed his indifference as to what the court might hold or do on account of his remarks and conduct, and later did not try to purge himself of his improper remarks and misconduct, although he was given ample opportunity to do so."

In this instance a case arising under the Workmen's Compensation Law was being tried. It is undisputed that the method of procedure in compensation cases is complicated, and the form of special issues to be submitted to the jury by the trial court has given this Court grave concern, and the rules have been amended from time to time in order to clarify the questions so that the trial courts, attorneys, and juries may not be confused. The court had submitted several issues to be answered by the jury. The attorneys had a right to argue those issues to the jury, in order that they might understand and intelligently answer them. Great latitude is allowed counsel in discussing the facts and issues in a case.

Now let us analyze the facts as shown by the record. It clearly appears that relator was trying to explain to the jury the rights and claim of his client. He contended that he thought "it was material to tell the jury what the average

weekly compensation is of this claimant, so they can tell where he is." The judge interrupted relator and indicated his ruling upon this question:

[fol. 59] "By the Court: They are not interested in dollars and cents.

"By Mr. Fisher: They are interested to this extent . . .

"By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

"By Mr. Fisher: Note our exception."

Relator obeyed this ruling. He told the jury that plaintiff could only recover for 125 weeks "at whatever compensation the rate will figure under the law." This statement does not indicate that relator was disobeying the ruling of the court, but, on the contrary, shows that he was trying to obey same. The judge again interrupted relator, and said:

"Gentlemen! Mr. Fisher, you know the rule and I have sustained his objection.

To what rule did the judge refer? The objection sustained related to "dollars and cents." Relator replied:

"I am asking . . ."

The court then said:

"Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

It is very difficult to conceive why relator did not have the right to make this statement.

Then followed this colloquy between the judge and relator:

"By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

"By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

"By Mr. Fisher: That is all right. We take exception to the conduct of the Court."

Upon this state of the record at that time the court fined relator $50.00 and ordered the sheriff to collect the fine.

The relator then asked the court why he was fined, and the record then discloses the following:

> [fol. 60] "By Mr. Fisher: You mean for trying to represent my client?
>
> "By the Court: No, sir; for contempt of Court. Don't argue with me.
>
> "By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument——
>
> "By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.
>
> "By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.
>
> "By the Court: That will be a hundred dollar fine and three days in jail. Take him out."

Just what order of the court did relator disobey that authorized the court to fine him $100.00 and have the sheriff confine him in jail for three days? The court ordered relator not to *sid*cuss the question of "dollars and cents," and there is nothing in the record to show that he disobeyed that ruling. During the colloquy the judge made this unusual statement, which I repeat:

> "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides."

To this statement relator took exception. The language of the judge was not in keeping with the dignity of the court. Judges, like attorneys, are human, and are not always infallible. Frequently, during a trial, attorneys may become overzealous in representing their clients, and it is the duty of the court, without bias, partiality, or vindictiveness, in a dignified manner, to see that order is maintained during a trial. This Court announced the rule that "The power to punish for contempt should be exercised with great caution, and only as a preservative, and not as a vindictive measure." Herring v. Houston Nat'l Exchange Bank, 113 Tex. 337, 255 S. W. 1097.

I have already stated the condition of the record when this Court granted relator a writ of habeas corpus. The

two judgments of the court speak for themselves. The first [fol. 61] order was the one under which the sheriff took relator under custody. No commitment was issued at the time. This order of contempt contains no recital of facts upon which the alleged contempt was based. Unquestionably the original order and the proceedings thereunder were void. The rule is stated in 9 Tex. Jur., 631, as follows:

> "There must be a recital of all the facts necessary to confer jurisdiction to inflict punishment. Thus a judgment against an attorney has been held not to be sustainable in a direct habeas corpus proceeding where neither the judgment of contempt nor the commitment thereunder shows the nature of the contemptuous act or utterance."

See also Ex parte Bullington, 145 S. W. 1190; Ex parte Miller, 244 S. W. 613; Ex parte Crenshaw, 259 S. W. 587. I quote the following from 9 Tex. Jur., p. 633:

> "Confinement, upon verbal order, prior to the entry of judgment of contempt and the issuance of a writ of commitment, is illegal, and the court is without power to order the issuance of such writ after the appellate court has granted a writ of habeas corpus. The commitment will not be held invalid, however, where all the record proceedings have been entered before the writ of habeas corpus is granted." For a full discussion of this rule see the cases cited in the footnotes.

The amended order embraced the facts upon which the final commitment was issued, and I shall assume that this order was filed before the writ of habeas corpus was granted by this Court. I do not think the facts set out in the amended order will support the judgment of contempt, and their sufficiency should be tested by the decisions of the courts.

The Court of Criminal Appeals in the Crenshaw case, supra, held that the facts involved in that case did not sustain contempt of the court, and said:

> "Relator was engaged in the defense of his client, and it seems without dispute that, in the execution of what must be regarded by every attorney as his sworn

duty, he wished to state his exceptions to language used by the court in remarks accompanying his ruling. As substantially stated above, the language of the court may or may not have been exceptionable,—we are not concerned with this question—but the fact remains that the right to except to such remarks was inviolable."

[fol. 62] In Ex parte Miller, supra, the Court of Criminal Appeals, in discussing the facts, said:

"It is true that the dignity of the courts is to be upheld and decorous conduct and language greatly become the advocate at the bar, but the right of free speech and of full representation by counsel guaranteed to one accused of crime is of serious weight, and much caution should be exercised in any case that these rights be not infringed or denied by reason of the fact that the person under discussion or criticism is the learned trial judge, and the thing legitimately under fire is his action."

Again, in the case of Ex parte Bullington, supra, it was said:

"Under the evidence adduced on this hearing, we do not think his conduct would constitute a contempt of court. He had a right in his argument to state to the jury his theory of the law, and to argue whether or not the evidence would render his client liable for damages."

In the Texas Law Review, Vol. 8, p. 110, there is an article written by Charles G. Russell on "Review of Contempt Judgments on Habeas Corpus Proceedings," and I quote the following therefrom:

"The Texas rule seems to be well settled that the factum of contempt must be found, and that 'if no judgment would be justified under the given state of facts, then the judgment would be void and subject to be set aside on habeas corpus; and the rule is further laid down that we can go behind the judgment of the court to ascertain these facts.' Also, the recitals in the judgment or order of commitment are not conclusive of the authority of the trial court, but the truth of these re-

citals may be looked into, for the purpose of determining whether the facts stated amount to contempt. The court cannot make contempt of that which is not contempt. * * * It would seem that the Texas courts have adopted a common sense view of preserving a balance between the power of the courts to punish for contempts, and the right of the individual to liberty guaranteed by the Constitution. The fact that a court has the inherent power to punish for contempt and can punish in a great variety of cases in order to uphold its dignity and to compel obedience to its orders and decrees, does not mean that such power is unlimited. The better rule would seem to be that on habeas corpus the court will examine the record, and determine whether the facts recited constitute contempt; if they could not amount to contempt then the trial court exceeded its authority, and the judgment can be set aside on habeas corpus."

[fol. 63] As I understand the majority opinion, it holds that the relator is not entitled to obtain any relief in this Court under habeas corpus proceedings, regardless of the lack of any probative evidence in the record showing that he was guilty of any contempt. The leading case cited to sustain this holding is Ex parte Testard, 101 Tex. 250, 106 S. W. 319. That case involved a judgment of the trial court in a constructive contempt proceeding. Relator in that case was charged with violating an injunction issued by the trial court. Mr. Justice Williams wrote the opinion of this Court in that case, and after stating certain facts said: "The petition and the writ in this case undoubtedly stated a case in which, under the decision referred to, the right to the injunction existed, and the ticket which relator is charged with selling fell within the class thus protected." Further facts involved in that case were discussed, and he further said: "No irregularity sufficient to invalidate the proceedings appears upon their face." After further discussion of the law and facts, it was further said: "It may be that if it conclusively appeared that opportunity was denied to relator to adduce evidence in his defense, *or that the court convicted him without any evidence whatever of his guilt*, that this would justify the conclusion that there was not such a hearing as was essential to the validity of

the judgment. The determination of questions like this which might be made in cases that might be supposed is unnecessary here, for the reason that they could only be determined from the proceedings, all of the proceedings, before the trial court, and no effort has been made to reproduce before us those had in the present case beyond the written record already stated. * * * An attack based upon the charge that a hearing was denied, or that a conviction was adjudged without any evidence, necessarily depends for its success upon what was done in the trial court and must be supported by a showing of all that occurred there. No [fol. 64] attempt at such a showing has been made and we must presume that there was a hearing, that opportunity to adduce evidence was allowed, and that there was evidence tending to support the conclusion of the court expressed in the judgment." (Emphasis mine.) Based upon the record and a lack of the statement of facts, and no attack being made upon the sufficiency of the evidence, the Court held that it was a collateral attack upon the judgment, and no amount of evidence not embraced in the record offered in this Court tending to show the guilt or innocence of relator could be considered by this Court.

The other cases cited in the majority opinion show facts different from the facts involved in this case. The Testard, Olson, Duncan, and Genecov cases involved judgments of contempt based upon violating an injunction. The Lipscomb case involved the right of an attorney to refuse to testify on account of being an attorney for one of the parties to the suit. The Hughes case involved an effort of the State to enforce the usury laws, and this Court released Hughes on a writ of habeas corpus. In the Dulaney case, Dulaney was found guilty of contempt for violating an order to produce in court a certain promissory note. The record in the Norton case embraced facts upon which the trial judge entered an order of contempt, and this Court reviewed the evidence, as shown by the opinion.

Here the judgment of contempt sets out completely the facts upon which the judgment is based, and they are relied upon to furnish the reason and authority for the trial judge to adjudge relator in contempt of the court. Relator has not refused to testify in the case, nor has he been adjudged in contempt for refusing to testify or for violating some injunction issued by the court. This is no appeal from the rulings of the trial court on the merits of the case, or for

[fol. 65] the correcting of errors of the trial court in the admission or exclusion of evidence. This Court will not consider such questions in habeas corpus proceedings. This record shows that relator was adjudged in contempt of the court for taking an exception to the remarks of the court.

The facts involved in this case should be considered in passing upon the authority of the trial court to enter the order of contempt. They are the very heart of the controversy, and are embraced in the judgment. I do not think that this Court meant to hold, or did hold under the cases cited involving habeas corpus proceedings, that it was powerless to review the very facts upon which the order rests, or lack of facts to support the order, when attacked as here. If that be the rule, then a contempt order need have no facts to support it, and trial judge would be at liberty to act as he pleased, and no relief could be obtained by writ of habeas corpus against the vindictiveness of the judge.

Relator had the right and it was his duty to take an exception to the statements of the court, if he desired to preserve the point for future proceedings. It seems that the judge was offended by the exception made by relator and proceeded to order the sheriff to take relator into custody and remove him from the courtroom; that he fined relator $100.00, and, in addition thereto, ordered that relator serve a term of three days in jail.

It seems to me that the majority opinion is inconsistent in its holdings. It first holds that this Court is powerless to review the evidence embraced in the judgment of contempt in order to say whether the trial court was authorized under the facts to find the relator guilty of contempt, and then it proceeds to consider the evidence, passes upon the sufficiency of same, and condemns relator for his acts. If [fol. 66] the first holding is correct, then the second holding is beyond the power of this Court, and is pure dictum.

The majority opinion further states: "Then there ensued that unfortunate and regrettable dialogue between the relator and the trial judge which resulted in the infliction of punishment against the relator." The facts and holding on this point emphasize the importance of the question under consideration. Every person is entitled to have his case tried before a fair and impartial judge. Here relator was not entitled to a jury in his case, and was adjudged in contempt by a judge who was a party to the "un-

fortunate and regrettable dialogue." This is no appeal from the merits of the case, and if, in spite of the acts of the court, the jury answered the issues favorably to plaintiff and judgment was entered in his favor, plaintiff would have no need of taking an appeal. However, that does not relieve the relator of this judgment of contempt entered by a judge who had lost his judicial poise and fairness. The evidence shows that the judge became the aggressor, and relator should not have been held in contempt of the court.

When all the facts and circumstances surrounding this case are considered, it is clear that relator was not guilty of contempt, and the judge was not authorized to enter the order of contempt. Therefore I dissent from the majority opinion, and relator should be discharged.

John H. Sharp, Associate Justice.

Opinion delivered 12 Nov. 1947.

[fol. 67] [File endorsement omitted.]

[fols. 68-69] SUPREME COURT OF TEXAS

November 12, 1947

No. A-1328

Ex Parte JOE J. FISHER

On Writ of Habeas Corpus

JUDGMENT—November 12, 1947

On this the 12th day of November, 1947, came on to be heard before the Supreme Court the petition for a writ of habeas corpus filed by the Relator, Joe Fisher, wherein the said Relator claims that he is illegally restrained of his liberty under color of a wit of commitment issued by the authority of the First Judicial District Court of Jasper County, Texas, for an alleged contempt of court, and, upon careful consideration of said petition, this Court being of the opinion that the said District Court had the power and was fully authorized to issue said commitment and to adjudge the Relator in contempt of court; that the judgment of said contempt proceeding was valid, and that Relator's

petition for such writ of habeas corpus should be denied, it is therefore Ordered, Adjudged and Decreed that said Relator's petition for the writ of habeas corpus be, and the same is hereby, in all things refused.

It is the further order of this Court that the order granting the temporary writ of habeas corpus be set aside, and the Relator be remanded to the custody of the Sheriff of Jasper County, Texas, to carry out the judgment of the District Court.

It is further ordered that the Relator, Joe J. Fisher, pay all costs incurred herein, for which execution may issue. (Dissenting opinion filed by Mr. Justice Sharp).

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 70] IN THE SUPREME COURT OF TEXAS

No. A-1328

Ex Parte JOE FISHER, Relator

RELATOR'S MOTION FOR REHEARING—Filed November 28, 1947

To the Honorable Supreme Court of Texas:

Relator realizes that a case such as this is not an easy one for a court to decide. Both of the opinions herein reveal that this Honorable Court has made a most careful and conscientious study of the problems involved, and, regardless of the outcome of the case, Relator wants to express his appreciation to the Court for its patience and for its efforts herein. In this motion for rehearing, Relator is not challenging or controverting a single proposition of law set forth in the opinions of the Court. Relator believes, however, that the majority of the Court has viewed the facts of this case other than in their true perspective, and solely on this ground Relator presents this his motion for rehearing and respectfully moves that the Court grant said motion, withdraw the opinion and judgment which were

entered on November 12, 1947, and make permanent its writ of habeas corpus.

[fol. 71] Statement of Ground for Rehearing

This Honorable Court erred in concluding from the facts herein that Relator violated any order or instruction by the trial court with respect to the scope of his jury argument.

Statement of Facts and Argument

At the outset, Relator desires to make clear the fact that he fully agrees with the holding of the Court to the effect that a trial judge has full power to make rulings with respect to a jury argument and that it is the duty of an attorney to obey such rulings regardless of whether they are right or wrong. No matter how erroneous a ruling by a trial court may be, Relator fully appreciates the fact that an attorney should respectfully state an exception, should scrupulously conform with the ruling, and should test its validity only upon a direct appeal.

At the same time, however, Relator submits that where a ruling by a trial court is ambiguous or where it is patent that an attorney has misunderstood the scope of the ruling, the attorney has both a right and a duty to attempt to obtain a clarification of the ruling so that he can understand it and can thereby obey it. Relator further submits that an attorney should not be held in contempt where he attempts to obey an instruction of a trial court, but where—either because of an ambiguity in the ruling or otherwise—it is evident that he has misunderstood the scope of the instruction. [fol. 72] The majority of this Court has concluded that Relator is guilty of contempt of court because he made certain statements "notwithstanding the specific orders of the court, and apparently in defiance thereof". Relator states to the Court in all truth and with all sincerity that he did not knowingly attempt to defy the trial court when he continued with his jury argument, and that he honestly believed that he had complied with the only instruction which he ever received from the trial court. Mr. Justice Sharp has so construed the facts in his dissenting opinion, and, to the certain knowledge of Relator, Justice Sharp's construction of the facts is more in harmony with the actual occurrences at the trial than is the interpretation of such facts by the majority of the Court.

The Court is, of course, familiar with the facts herein, but Relator desires to make one final review thereof for the purpose of attempting to show the Court what Relator thought such facts meant at the time of their occurrence.

In prefacing his jury argument, Relator said:

> "Now bear in mind, gentlemen, that this is what we call a specific injury. A general injury is an injury to the entire body. This is what is known as a specific injury, and it is confined to the left foot. We have specific injuries where you have injuries to the eye, to your hand, and to your foot; this is an injury to the foot, to the left foot; and the law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. [fol. 73] That is the most compensation Anderson Godfrey could receive, would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate."

At this point, Relator had told the jury two things: (a) He had told them that the maximum period of recovery was one hundred and twenty-five weeks. He had made this statement three times without any objection being raised to it—once in the middle of the above quotation, and twice near the end of the quotation. (b) He had just mentioned the factor of the "average weekly compensation rate" when he was halted by the following discussion:

> "Mr. Cox: Your Honor please——
>
> "The Court: Wait a minute.
>
> "Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.
>
> "The Court: That has all been agreed upon.
>
> "Mr. Fisher: I think it is material, your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.
>
> "The Court: They are not interested in dollars and cents.
>
> "Mr. Fisher: They are interested to this extent——
>
> "The Court: Don't argue with me. Go ahead. I will give you your exception to it.

"Mr. Fisher: Note our exception.
"The Court: All right."

[fol. 74] Let us examine this discussion item by item. Mr. Cox objected because the "jury is not concerned with the computation". This objection could have referred to one or both of two things—it could have referred to the statement about "One hundred twenty-five weeks" or it could have referred to Relator's action in starting to state the "average weekly compensation rate". Since Relator had twice previously mentioned—without objection—the factor of one hundred twenty-five weeks, and since he was just starting to mention the weekly compensation rate when he was interrupted, is it not reasonable to assume—as did Relator—that Mr. Cox's objection went only to the proposed mention of the compensation rate and that it did not relate to his mention of the period of one hundred twenty-five weeks?

The trial court then stated "That has all been agreed upon." The only effect of this statement could be to strengthen Relator's conviction that the objection went to his proposed statement of the compensation rate. Necessarily this must be true, for the only thing that had "been agreed upon" between the parties was the amount of the compensation rate. There was no agreement with respect to the duration of the injury, and, indeed, this was one of the very issues which had been submitted to the jury.

[fol. 75] That Relator so understood the foregoing colloquy is clearly shown by his next remark "I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is." Here again Relator was addressing himself solely to what he thought was in the minds of Mr. Cox and of the Court—their objection to his proposed mention of the amount of the compensation rate.

The trial court responded "They are not interested in dollars and cents." Relator submits that here too he was entirely justified in thinking that what Mr. Cox didn't want him to do—and what the trial court was telling him he could not do—was to mention the dollars and cents amount of the compensation rate. Whether Relator was correct in believing that he was entitled to put this rate before the jury, or whether the trial court was correct in excluding it, is, of course, immaterial. What matters is that rightly or

wrongly the trial court was telling Relator he couldn't make a certain type of argument, and that Relator was obeying the court's instruction as he understood it.

Following this, Relator attempted to explain why the jury might be interested in the dollars and cents figure. He was halted by the trial court, was told "Don't argue with me. Go ahead. I will give you your exception to it," and Relator took his exception without further argument. [fol. 76] It appears obvious that the only express order which the trial court ever addressed to Relator was "don't argue with me", and Relator obeyed this order by promptly taking his exception and desisting in his arguments or explanations. If there was any other order implicit in the trial court's remarks, it was an order not to give the dollars and cents figure of the compensation rate, and, as is shown below, this order also was scrupulously obeyed.

Following the discussion quoted above, Relator continued his argument as follows:

> "This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law."

It is the making of this statement which is deemed contemptuous by a majority of this Honorable Court. In making the statement, Relator did two things: (a) He reiterated his mention of a one hundred twenty-five weeks period—a remark which he had made twice previously without objection, and a remark which he did not understand to be within the scope of Mr. Cox's objection or the trial court's ruling thereon—if there was any such ruling. (b) He abandoned his intention of giving a dollars and cents figure for the compensation rate—such abandonment being, according to his understanding, a compliance with the objection and the ruling, and he substituted the harmless equivocation "at whatever compensation the rate will figure under the law." [fol. 77] Relator is absolutely unable to see how this statement could be deemed to be in contempt of court. He did not mean it to be contemptuous, and, although he is perhaps blinded by the fact that he alone knows what he meant, he is utterly unable to perceive how, even on its face and apart from Relator's intent, the statement could be construed as contemptuous. Plainly, Relator was merely attempting to pick up the thread of his argument at the point where he

was interrupted. As almost any speaker will do, he reverted or backtracked to what he had previously been discussing—the period of one hundred twenty-five weeks—and he continued by refraining from saying what he had intended to say—the dollars and cents figure of the rate—and merely told the jury that the rate would be determined according to the law.

Upon a renewed objection by Mr. Cox, the trial court stated "Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection." Mr. Fisher responded: "I am asking——", and the trial court interrupted: "Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

Here again, Relator submits, there is nothing that is contemptuous. When the trial court reprimanded Relator for the manner in which he continued his argument, Relator for the first time was apprised of the fact that the trial court must have meant more by its earlier remarks than he had [fol. 78] understood, and, especially, that the trial court must have meant something in addition to the prohibition against mentioning the dollars and cents figure of the compensation rate. This prompted Relator to start to inquire as to the precise scope of the court's ruling—"I am asking——." As Relator has stated in his application for habeas corpus, Relator wanted to ask the court "Did you mean in your earlier ruling only that I am not to mention the dollars and cents figure of the rate, or did you mean that I am not even to explain the difference between a general and specific injury and the period of weeks which is applicable to the latter?"

If the trial court had permitted Relator to make this inquiry with respect to the scope of its ruling, the whole of what this Court has rightly called an "unfortunate and regrettable dialogue" would have been avoided. Relator had previously obeyed the ruling of the court as he understood it, and there is no reason to believe that Relator would not likewise have obeyed the ruling if the court had permitted him to find out just how broad it was.

However, in lieu of permitting Relator to make his inquiry, the court cut him off with the statement "Don't argue with me". If blame is to be placed upon the shoulders either of Relator or of the trial judge, Relator submits that [fol. 79] the trial court's failure to permit him to inquire as

to the scope of its ruling was the first blameworthy incident in this entire exchange.

As stated above, Relator fully understands that an attorney must obey the rulings of a trial judge whether they are right or wrong. Likewise, Relator understands that an attorney should not argue with respect to a ruling after a trial court has made it and has indicated that it does not desire further argument. However, Relator contends that an attorney has an inviolable right to inquire as to the scope of a ruling—an inviolable right to try to find out just what the trial court means so that he can conform his conduct to the court's meaning. It is ridiculous to say that an attorney must obey a ruling of a trial court and then to deny to the attorney the right to find out what the ruling is, yet this is precisely what was done by the trial court in this case.

An equitable decision in a case such as this must steer between the Scylla of protecting the dignity and decorum of the courts and the Charybdis of preserving an attorney's right to take all legitimate action in behalf of his client. Relator submits that up until the time when he was prevented from inquiring as to what the trial court meant by its ruling, nothing had occurred which could possibly offend the dignity of a court. Relator further submits that the refusal of the trial court to permit him to inquire just what [fol. 80] character of ruling had been made was the first occurrence which is subject to criticism and was a serious encroachment upon the right of Relator or of any attorney to represent his client.

After the trial court had prevented Relator from inquiring as to the scope of its ruling and had instructed the jury to disregard Relator's last statement to the jury, Relator continued: "Note our exception. I think I have a right to explain whether it is a specific injury or a general injury."

It is difficult to see anything in this remark which is objectionable. Certainly Relator had a right to except to the action of the court in instructing the jury to disregard his prior remarks. Likewise, under the rules and decisions of this Honorable Court it was necessary for Relator to state to what he was excepting. His statement "I think I have a right to explain whether it is a specific injury or a general injury" has two explanations, each of which is eminently reasonable. In the first place, the statement was necessary to explain the nature of his exception. In the second place,

as we have endeavored to show above, Relator had been under the impression that the court's earlier admonition related solely to the dollars and cents figure of the compensation rate and it had just begun to dawn upon Relator that the court might have meant its earlier ruling to be broader. He had been prevented from inquiring if the court meant to say that the earlier ruling was so broad that [fol. 81] he couldn't even explain the distinction between a specific and a general injury, and he injected this remark in a renewed endeavor to ascertain if what the court had done was to rule that he couldn't explain such distinction. Hence, the remark by Relator which is last quoted above was both explanatory of his exception and interrogatory of just what the trial court meant he shouldn't say. Viewed from either aspect, the remark was far from contemptuous.

It was at this point that the trial court stated: "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides." This statement has been the subject of so much comment that Relator will not discuss it further, other than to say that it is difficult to see how Relator's action in obeying—as he thought—the court's ruling or in attempting to inquire just what the ruling was could be construed as "messing" with the trial court under any definition of the latter word.

Following this remark, Relator stated: "That is all right. We take exception to the conduct of the court." The court replied "That is all right; I will fine you $25.00." Hence, it was at this point that the judgment of contempt was, for the first time, made.

In an exchange of words subsequent to this initial judgment of contempt, the penalty was progressively increased [fol. 82] to the maximum fine of $100.00 and imprisonment for three days. Relator confesses that he does not look back upon his part of the subsequent exchange of words with any feeling of pride. He trusts that the judge has the same feeling. However, Relator was not adjudged in contempt and was not committed in contempt for anything which occurred during the subsequent exchange. Rather, the sole alleged offense of Relator which is recited in the contempt judgment and in the commitment is the offense of persisting in an improper jury argument after being ordered by the trial court to refrain from such argument. If Relator was not guilty of this offense—the only offense with which

he was charged and committed—he is entitled to his writ of habeas corpus from this Honorable Court.

Relator has attempted to show above that he did not intend to, and did not in fact, persist in a jury argument after being instructed not to do so. Upon the first objection raised by Mr. Cox, the only instruction by the trial court—if such it was—was not to go into the dollars and cents of the compensation rate. At the risk of being unduly repetitious, Relator reiterates that he obeyed such instruction—that he reframed his proposed argument and omitted his proposed statement of the dollars and cents amount of the claimant's compensation rate. In so doing, he alluded to [fol. 83] his earlier statement of the compensation period, but he had previously referred to such period at least twice without objection, and he could not—and did not—reasonably understand the court's remarks to prohibit him from mentioning such period or from restating anything that he had previously said, or from doing anything except to make his proposed statement of the exact compensation rate.

If Relator was in contempt of court—if he did persist in an improper jury argument after being instructed not to do so—it was solely because he misunderstood the instruction of the trial court and, after he began to suspect that he might have misunderstood, was prevented from making an inquiry which would have clarified the entire matter. If this is an offense, then Relator clearly is guilty of it. However, Relator earnestly contends that at the very least any instruction which was given him by the trial court was highly ambiguous and could not reasonably have been understood by him or by any attorney in a similar situation to be other than an admonition not to discuss the dollars and cents figure of the compensation rate. Relator further contends that the whole of the conversation between him and the trial court demonstrates that he understood the instruction to cover only the dollars and cents figure of the rate, and that Relator in no way trespassed upon such instruction. If the original opinion of this Honorable Court [fol. 84] is permitted to stand and if Relator is further punished for the occurrences set forth above, his punishment will be for an offense—if such it be—which he did not intend to commit, for an offense which he committed solely because of an innocent—and reasonable—misunderstanding, and an offense which resulted solely from the fact that the trial court delivered an ambiguous instruction and

refused to permit Relator to obtain a clarification of such instruction.

As appears above, Relator has stressed in this motion the fact that he did not knowingly violate any order of the trial court, since, as is demonstrated by the whole of the evidence herein, he thought that he was refraining from making the argument to which the court's remarks were addressed. In addition to these contentions, one further aspect of the case is deserving of mention.

The contempt judgment occurred immediately after Relator had preserved an exception to the conduct of the trial court, rather than after any allegedly improper jury argument which Relator might have made. From a reading of the whole of the evidence herein it appears difficult to escape the conclusion that—as originally stated in Relator's brief herein—the occurrence which touched the tinder to the trial judge's temper and the occurrence for which Relator [fol. 85] was punished was his action in excepting to the conduct of the court, rather than his action in persisting in any character of jury argument. The case of *Ex parte Crenshaw*, 259 S. W. 587, 31 A.L.R. 1181, is, of course, direct authority to the effect that a court does not possess jurisdiction to punish an attorney for contempt because of his action in excepting to the language or conduct of the court. Even without such authority, it is unthinkable that this or any other court would sanction such punishment. Yet, Relator respectfully submits, that is precisely what has been done in the original disposition of this case. If Relator had not excepted to the conduct of the court, it appears safe to say that he would now now be in his present predicament; yet if Relator had refrained from making such an exception, he clearly would have been derelict in his duty to his client. Relator repeats that the record plainly shows that the action for which he has been—and seemingly will be—punished is the taking of an exception to the court's conduct. As this Court stated in *Herring v. Houston National Exchange Bank*, 113 Tex. 337, 255 S. W. 1097:

> "The power to punish for contempt should be exercised with great caution, and only as a preservative, and not as a vindictive measure."

If vindictiveness cannot be used as a basis for a contempt judgment, Relator is entitled to be discharged from such a judgment in this case.

[fol. 86] Wherefore, Relator prays that this motion be granted, that this Court withdraw its opinion and judgment of November 12, 1947, and that the Court make permanent its writ of habeas corpus herein.

Respectfully submitted, Collins, Dies, Williams and Garrison, J. J. Collins, Lufkin, Texas; Looney and Clark, Everett L. Looney, Edward Clark; R. Dean Moorhead, Brown Building, Austin, Texas, Attorneys for Relator.

A copy of this motion has been mailed to Mr. Robert W. Hillin of Jasper, Texas, attorney of record for the respondent.

[fol. 87] [File endorsement omitted.]

IN THE SUPREME COURT OF TEXAS

EX PARTE JOE FISHER, Relator

RESPONDENT'S ANSWER TO RELATOR'S MOTION FOR REHEARING —Filed December 8, 1947

[fol. 88] To the Honorable Supreme Court of Texas:

The majority opinion handed down in this case clearly follows stare decisis and the common sense rule for the preservation of order in our trial courts. Were it not so, we may as well abandon our court houses and resort to other means of settling legal disputes, for without order our trial courts would be but a mockery of dignity and justice.

Respondent contends that the majority opinion and judgment rendered by this Honorable Court on November 12, 1947 is in all things correct and that no Motion for Rehearing should be granted in this cause.

[fol. 89] Respondent's Counter Statement

This Honorable Court did not err in holding that Relator's conduct, in persisting in making objectionable argument after the Trial Court had ruled such argument to be

objectionable and admonished Relator not to continue such line of argument, was contempt.

(In reply to Relator's Statement of Ground for Rehearing)

"Facts and Argument under Respondent's Counter-Statement

In Relator's original Brief he raises the following propositions:

"Point One—As a matter of law Relator was not guilty of contempt.

Sub-Point (b)—The Uncontroverted Facts Clearly Show that Relator was not Guilty of Contempt."

Under an adverse decision to the above contentions Relator would now have this Honorable Court believe that if he was guilty of contempt, as found, that he did not mean to be and that it was ignorance on his part. This change in tactics is somewhat akin to the football player who starts down one side of the field and finding it blocked reverses his field and tries the other side.

The whole case boils down to the proposition that Relator, in his argument to the jury, was attempting to and did inform the jurors of the legal effect of their answers to the special issues submitted to them. This practice has long been condemned by our Courts and reference to authorities thereon is unnecessary. Relator, in his argument, made this statement:

[fol. 90] "The *law* states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. *That is the most* Anderson Godfrey *could receive*, would be one hundred and twenty-five weeks, *because his injury is confined to his left foot. That is all we are asking.* Now, that means one hundred and twenty-five times the average weekly compensation rate."

This is definitely an attempt to inform the jury that plaintiff's injury is confined to his left foot, that he had a low compensation rate, and therefore they (the jury) should give him the maximum, one hundred and twenty-five weeks compensation. Opposing Counsel objected to this line of argu-

ment and the Trial Court sustained his objection. Relator then replied:

"I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant *so they can tell where he is.*"

Does this latter statement indicate any misunderstanding or ignorance on the part of Relator as to the scope of the Court's ruling and what it meant? It is difficult for the writer to concede that such an astute attorney, as Relator, could be so naive. After being admonished by the Court not to proceed in such line of argument, Relator continued as follows:

"This negro, *as I stated*, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law."

Relator was, undoubtedly, at this point reminded of the old saying:

"There is more than one way to skin a cat",

because he was saying the same thing in different terminology and tied it in with his original statement by saying "as I stated". To what statement was Relator referring? This was a deliberate, patent act on the part of Relator to violate the ruling of the Trial Court by repeating the same argument which the Court had previously held objectionable.

[fol. 91] In his Motion For Rehearing, Relator contends that he attempted to comply with the Court's ruling. The reasoning offered to support this contention is completely untenable in the face of the record.

Next, Relator contends that he did not mean to violate the Court's ruling, and if he did, it was through ignorance on his part as to the scope and meaning of the same. It has been said:

"Where ignorance is bliss,
'Tis folly to be wise";

but in the seventeenth century John Seldon made this statement:

"Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him."

As stated in this Honorable Court's opinion:

"In passing on this question (of contempt) we must consider the proceedings as a whole and not merely isolated portions thereof."

Relator, in his Motion For Rehearing, has attempted to show by isolated portions of the facts that he did not understand and did not intend to violate the Court's ruling. In the face of the record it would appear that Relator was deliberately trying to cause a mistrial. Perhaps plaintiff's theory of the case had gone none too well and he wished another chance. This is mere supposition, but it is just as reasonable as Relator's statement that he did not understand the Court's ruling and did not intend to violate the same. It is indeed strange that one, such as Relator, who has been District Attorney in this District for many years and has worked all of that time under the same Judge, should be unaware of the same Judge's mannerisms, terminology, etc. in regard to his rulings. It is also difficult to concede that Relator did not realize that his effort to inform the jurors of the legal effect of their answers to the special issues was a practice long condemned by our Courts. [fols. 92-93] Knowing the Trial Judge as the writer does and as Relator should, if Relator is sincere in his statement that he was ignorant of or misunderstood the scope and meaning of the ruling of the Trial Judge, he has but to appear before the Trial Judge and acknowledge his error and purge himself of the contemptuous conduct on his part and the Trial Judge will accept such and forgive and forget. This Trial Court and all others must demand respect, dignity, and order in their respective courts. Our Courts should be respected and held in the highest degree of dignity by all, and more especially by the attorneys, who are in fact members of the Courts.

In view of the record, the Trial Court clearly had jurisdiction in this matter and Relator was guilty of contempt.

Wherefore, Respondent submits that the original majority opinion is in all things correct, and pray that Relator's Motion For Rehearing be overruled.

Respectfully submitted, Robert W. Hillin, District Attorney, 1st Judicial District, Jasper, Texas, Attorney for Respondent.

A copy of this instrument has been mailed to Messrs. Collins, Dies, Williams & Garrison, Lufkin, Texas, and Messrs. Looney & Clark, Austin, Texas, Attorneys for Relator.

[fol. 94] IN THE SUPREME COURT OF TEXAS

No. A-1328

Ex Parte JOE FISHER, Relator

RELATOR'S SUPPLEMENTAL MOTION FOR REHEARING—Filed January 21, 1948

To the Honorable Supreme Court of Texas:

Pursuant to leave of the Court, Relator files and presents this his Supplemental Motion for Rehearing, augmenting the original Motion for Rehearing filed herein, and respectfully moves that the Court grant said Motions, and each of them, that it withdraw the opinion and judgment filed and rendered hereon on November 12, 1947, and that it make permanent its writ of habeas corpus.

Statement of Grounds for Rehearing

I

This Honorable Court erred in concluding from the facts herein that Relator violated any order or instruction by the trial court with respect to the scope of his jury argument.

(This point was assigned in the original Motion for Rehearing and argument under such point will be found in said Motion.)

[fol. 95] II

Under the undisputed facts in evidence herein, no contempt is shown, and the imposition of a fine and

the infliction of imprisonment upon Relator for an alleged contempt based upon such facts constitute a deprivation of the liberty and property of Relator without due process of law in contravention of Section 19 of Article I of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States.

III

Under the undisputed facts in evidence herein, the order or instruction which Relator is charged with disobeying is so vague and unintelligible as to make impossible an understanding of the nature and scope of such order or instruction, and the infliction of imprisonment and the imposition of a fine upon Relator for an alleged disobedience of such order or instruction constitute a deprivation of the liberty and property of Relator without due process of law in contravention of Section 19 of Article I of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States.

IV

Under the undisputed facts in evidence herein, a fine was imposed and imprisonment was inflicted upon Relator for his action in taking and preserving an exception to the conduct of the trial court, rather than for any disobedience of any order or instruction of such court, and the imposition of such fine and the infliction of such imprisonment constitute a deprivation of the liberty and property of Relator without due process of law in contravention of Section 19 of Article I of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States.

V

Under the undisputed facts in evidence herein, Relator was not tried and committed for contempt by an impartial and unbiased judge, and such fact, together with the seeming refusal by this Honorable Court to review the factum of contempt, result in a situation in which Relator has been fined and sentenced to imprisonment without trial and without due process of law in

contravention of Section 19 of Article I of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States.

[fol. 96] VI

Under the undisputed facts in evidence herein, the action by the trial court in fining and sentencing Relator to imprisonment was arbitrary and resulted in the deprivation of the liberty and property of Relator without due process of law in contravention of Section 19 of Article I of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States.

Argument under Grounds II to VI, Inclusive

Relator knows of no decision in any court which is squarely in point with respect to Grounds for Rehearing II through VI. However, general principles set forth in many decisions lend support to such Grounds. In lieu of entering into a detailed discussion of such decisions, Relator will merely set forth herein a summary of the general principles upon which he relies. As is stated in *Ex Parte Duncan*, 62 S. W. 758, a court cannot:

"make contempt of that which is not contempt; and every attempt to do so would be in excess of authority or jurisdiction, as much so as if the court had no authority or power to punish for contempt, either in relation to the person or subject-matter. There must be contempt in order to justify punishment for that offense."

In his original Motion for Rehearing, Relator contends that he did not wilfully disobey any order or instruction of the trial court. Moreover, the Court is reminded of the principle set forth in *N. L. R. B. v. Bell Oil & Gas Co., et al.*, 98 F(2d) 405, to the effect that:

"A person acting in good faith and with due respect to the court is not guilty of contempt if placed in a dilemma by an ambiguous order of the court."

[fol. 97] Consequently, with respect to Grounds for Rehearing II and III, Relator's position is as follows: Either

because there was no valid and intelligible order for Relator to obey, or because the facts show that Relator was attempting to obey whatever order or instruction the trial court gave, the facts herein do not show a contempt. On the basis of the principle that a court cannot "make contempt of that which is not contempt", Relator contends that the judgment herein undertakes to punish him for a matter which was in excess of the authority or jurisdiction of the trial court, and that any such judgment is violative of due process.

With respect to Ground IV, Relator's position is that the evidence herein clearly shows that Relator was held in contempt solely because he made an exception to the conduct of the trial court. Relator contends that any judgment which deprives an attorney of either property or liberty because of the attorney's action in making a proper and timely exception is violative of due process.

With respect to Ground V, Relator's contentions are as follows: In the usual contempt proceeding, the district judge is in a position where he can reasonably be said to be impartial and unbiased. Thus, in the case of an alleged disobedience of an injunction, the injunction is merely the act of the court and the judge has no personal interest [fol. 98] therein. In the case at bar, the facts show that the trial judge actively participated—if, indeed, he did not provoke—the situation at hand. His language and the entire interchange of words reveal that the judge cast aside his status of impartiality and became one of the disputants.

It has been held that a statute violates due process if it compels a litigant to submit his controversy to a tribunal of which his adversary is a member. 12 *Am. Jur.* p. 326. Upon a parity of reasoning, Relator contends that he has been denied due process when his controversy is heard only by a tribunal of which his adversary is the sole member. The "trial" of Relator in the district court was, within the standards of due process, no trial at all. Apt indeed is the following statement from *Cooke* v. *United States*, 267 U. S. 517, 45 S. Ct. 390:

> "The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

In Ground VI Relator contends that it appears from the face of the record herein that the action of the trial court in holding Relator in contempt was arbitrary and unwarranted. In this respect, Relator relies upon the following principle:

> "Due process of law protects against arbitrary action. Arbitrary action by the tribunal in the hearing of a cause or in its order violates due process. What is such arbitrary action depends upon the facts of the case.". 12 Am. Jur. p. 309.

[fol. 99] Wherefore, Relator prays that his Motion for Rehearing as supplemented by the foregoing motion, be granted, that this Court withdraw its opinion and judgment of November 12, 1947, and that the Court make permanent its writ of habeas corpus herein.

Respectfully submitted, Looney and Clark, Everett L. Looney, Edward Clark, R. Dean Moorhead, Brown Building, Austin, Texas, Attorneys for Relator.

A copy of this motion has been mailed to Mr. Robert W. Hillin of Jasper, Texas, attorney of record for the respondent.

[fol. 100] IN SUPREME COURT OF TEXAS

ORDERS OVERRULING THE MOTION FOR REHEARING AND THE SUPPLEMENTAL MOTION FOR REHEARING—January 21, 1948.

January 21, 1948.

No. A-1328

Ex Parte JOE FISHER

On Habeas Corpus

The motion for rehearing filed herein by the Relator having heretofore been submitted to the Court, and, after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

(Associate Justice Sharp dissenting.)

January 21, 1948.

No. A-1328

Ex Parte Joe Fisher

On Habeas Corpus

The supplemental motion for rehearing filed herein by the Relator having been duly considered with the original motion for rehearing, it is ordered that the said supplemental motion be, and is hereby, overruled.

[fol. 101] In the Supreme Court of Texas

Ex Parte Joe J. Fisher

Relator's Motion for Stay of Judgment Pending Application for Writ of Certiorari to the Supreme Court of the United States

To the Honorable Supreme Court of Texas, or to any Justice thereof:

Now comes Joe J. Fisher, Relator in the above styled and numbered cause and presents this his motion for this Honorable Court, or any justice thereof, to stay the execution and enforcement of the judgment and to withhold issuance of the mandate of the Court herein, and in support of such motion would show the Court the following:

I

This motion is filed pursuant to the provisions of 28 U. S. C. A., Section 350.

II

Relator proposes, in good faith, to file with the Supreme Court of the United States an application for writ of certiorari, requesting that said Court issue said writ for the purpose of reviewing the judgment of this Honorable Court herein, and Relator represents that the case at bar is a case which is subject to review by the Supreme Court of the United States on writ of certiorari.

III

Relator here and now evidences his willingness to give such good and sufficient security as may be required and

approved by this Honorable Court, or by any Justice [fol. 102] thereof, conditioned upon the payment of all costs of suit herein and of all damages and costs which Respondents may sustain if Relator fails to make application for writ of certiorari within the period of time permitted, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court of the United States.

IV

Relator represents that under the statutes of the United States his application for writ of certiorari may be filed at any time within a period of three months after January 21, 1948, the date upon which his motion for rehearing was overruled herein, and Relator requests that the enforcement and execution of the judgment of this Court, and the issuance of this Court's mandate, be withheld during such period of three months and for such additional time as the application for writ of certiorari, or proceedings in connected therewith, may be pending before the Supreme Court of the United States.

V

Wherefore, Relator prays that this motion be granted, and that this Honorable Court, or a Justice thereof, enter its or his order staying the execution and enforcement of the judgment herein, and the issuance of this Court's mandate, for a period of three months after January 21, 1948, and for such further time as an application for writ of certiorari herein, or proceedings in connection therewith, may be pending before the Supreme Court of the United States, such order to be conditioned as this Court, or any Justice thereof, may require and approve.

Respectfully submitted, Looney and Clark, Everett L. Looney, Edward Clark, R. Dean Morehead, Attorneys for Relator, Brown Building, Austin, Texas.

A cope of this motion has been mailed to Mr. Robert W. Hillin of Jasper, Texas, Attorney for Respondents.

Endorsed: Granted. Upon Relator's furnishing bond in the sum of $500.00, as required by Rule 36, Rules of the Supreme Court of the United States.

[File endorsement omitted.]

[fols. 103-104] IN SUPREME COURT OF TEXAS

ORDER STAYING MANDATE—January 28, 1948

Ex Parte JOE FISHER

The motion to stay issuance of mandate in this case filed herein by the Relator, Joe Fisher, having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, granted.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 105] IN THE SUPREME COURT OF TEXAS

No. A-1328

Ex Parte JOE J. FISHER

PETITIONER'S PRAECIPE FOR TRANSCRIPT—Filed February 18, 1948

To Honorable Geo. H. Templin, Clerk of Said Court:

Relator respectfully requests that you prepare a transcript of the proceedings herein under your official hand and seal for use in perfecting a petition for writ of certiorari in the Supreme Court of the United States, said transcript to include the following instruments:

(a) Application for Writ of Habeas Corpus. Omit Exhibits "A" and "B" and note that they are the same, respectively, as Exhibits "D" and "J" on the instrument next described below.

(b) Supplemental Application for Writ of Habeas Corpus and all exhibits.

(c) Temporary writ of habeas corpus and the return thereon.

(d) Per curiam opinion of the Court.

(e) Dissenting opinion of Mr. Justice Sharp.

[fol. 106] (f) Judgment of the Court.

(g) Relator's Motion for Rehearing.

(h) Respondent's Answer to Motion for Rehearing.

(i) Relator's Supplemental Motion for Rehearing, omitting the motion for leave to file same.

(j) Orders of the Court upon the Motion for Rehearing and Supplement thereto.

(k) Relator's Motion for Stay of Judgment and order granting same.

(l) This Praecipe.

Concurrent with the filing of this Praecipe a copy thereof is being mailed to Mr. Robert W. Hillin of Jasper, Texas, attorney for Respondent, so that he may, if he desires, designate any additional instruments for inclusion in the transcript.

Looney and Clark, R. Dean Moorhead, Brown Building, Austin, Texas, Attorneys for Relator.

[fol. 107] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

No. 415

In The

Supreme Court of the United States

OCTOBER TERM, ~~1947~~ 1948

JOE J. FISHER,

Petitioner

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,

Respondent

Petition for Writ of Certiorari and Supporting Brief

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1947

JOE J. FISHER,

Petitioner

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,

Respondent

Petition for Writ of Certiorari

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

Petitioner is an attorney at law who was adjudged in contempt by a district judge in Texas while he was arguing a civil suit on behalf of an injured negro. The punishment was the maximum permitted under Texas Law (Article 1911, Revised Civil Statutes of Texas, 1925), to-wit, a fine of $100.00 and imprisonment for three days. The words uttered

by Petitioner which allegedly constituted the contempt may be found both on pages 14-15 and 25-26 of the Transcript of Record herein. The parties are in agreement as to the words employed by Petitioner and as to the circumstances under which they were spoken.

Petitioner duly applied for a writ of habeas corpus from the Supreme Court of Texas. In a divided decision, that Court refused the writ. The opinion of the Texas Supreme Court may be found on pages 33 *et seq.*, of the Transcript of Record herein, with the dissenting opinion being on pages 40, *et seq.* The opinion of the Supreme Court of Texas is highly ambiguous, and is susceptible of at least two interpretations. On the one hand, the opinion appears to say that the Court will not review the language and acts of Petitioner to ascertain whether, as a matter of law, such language and acts constituted a contempt. The opinion of the Court was so construed in the dissenting opinion in this case (R. 49). On the other hand, there are indications in the opinion that the Court reviewed the facts, but held that such facts evidenced a contempt. Regardless of the interpretation which is placed upon the opinion, Petitioner contends that he has been deprived of due process of law in the courts of Texas for reasons which are amplified below.

Basis for and Statement of the Jurisdiction of the Supreme Court

The Supreme Court has jurisdiction to grant a

writ of certiorari in this cause under the provisions of Section 237 of the Judicial Code, as amended, Title 28, Section 344(b), U.S.C.A., by virtue of Petitioner's claim that in the Texas courts he was deprived of due process of law, and of the rights and privileges attendant to due process, in contravention of the Fourteenth Amendment to the Constitution of the United States.

This case differs from the usual case brought before this Honorable Court on certiorari in that the only forum in which Petitioner was afforded any character of trial below—the Supreme Court of Texas—was also the court of last resort in that State. Consequently, there is not present herein the usual situation of a trial in a state court, followed by appellate review in a state court. The district court of Texas summarily adjudged Petitioner to be in contempt without any character of trial, and, indeed, that court refused to permit Petitioner even to inquire how or wherein he was thought to be guilty of contempt (R. 14-15, 25-26). In accordance with the laws of Texas (Article 1737, Revised Civil Statutes of Texas, 1925), Petitioner utilized the only method available for review of a contempt judgment of this character and instituted an original action for habeas corpus in the Supreme Court of Texas. Hence, in complying with the requirements of Rules 12(1) and 38(2) of this Honorable Court, Petitioner cannot make a separate statement of how the federal questions were presented and dealt with by the trial court and by the appellate court of the State, and Petitioner can only set forth the manner in

which such questions were treated by the Supreme Court of Texas.

In his Supplemental Application for Writ of Habeas Corpus, Petitioner pleaded that the action of the district judge in committing him for contempt under the undisputed facts in the case constituted a deprivation of liberty without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States (R. 6). In its opinion, the Supreme Court of Texas did not specifically allude to the Federal Constitution, but it prefaced its discussion with the statement that:

> "The inquiry before us is whether or not a citizen is restricted of his liberty without due process of law." (R. 35).

Hence, it affirmatively appears that the Supreme Court of Texas expressly based its opinion herein upon the constitutional question of due process.

Subsequent to the rendition of judgment by the Supreme Court of Texas, Petitioner filed a motion for rehearing in which he contended that the opinion of the Court denied to him the due process of law guaranteed by the Fourteenth Amendment, either because—under one interpretation of the opinion—the refusal of the Texas court to review the facts prevented him from obtaining any character of an impartial trial upon the merits of his case, or—under the other interpretation of the opinion—any judgment of contempt based upon the undisputed facts herein also is violative of due process (R. 67-

69). In a split decision, and without opinion, the Supreme Court of Texas overruled this motion.

Petitioner recognizes the general rule established by the decisions of this Honorable Court to the effect that the Court normally will not take cognizance of federal questions presented in a motion for rehearing. In the case at bar, however, the federal question was pleaded by Petitioner at the inception of the suit and was referred to by the Supreme Court of Texas as constituting the "inquiry" before it. If the additional assignments of federal questions in the motion for rehearing are in any way necessary to confer jurisdiction upon this Honorable Court, Petitioner respectfully suggests that under the holding in *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 799, 58 L. Ed. 1363, the general rule referred to above does not obtain in a situation such as this in which the deprivation of due process results from, and exists by virtue of, the opinion and judgment of the court in which the motion for rehearing was filed. As will hereinafter be more fully shown, it was not until the opinion of the Supreme Court of Texas was handed down that Petitioner was apprised of the fact that no court in Texas would—under the interpretation of the majority opinion which is contained in the dissenting opinion—enter upon an impartial examination of the facts in his case, and it was not until the time for filing a motion for rehearing that Petitioner had reason to complain of the denial of due process which resulted from such refusal to review.

Petitioner's motion for rehearing was overruled by the Supreme Court of Texas on January 21, 1948, and this petition is being printed and mailed to reach the Clerk of this Honorable Court prior to the expiration of three months from such date.

Questions Presented

The questions presented herein may be stated in two categories, dependent upon the interpretation which is placed upon the opinion of the Supreme Court of Texas.

(a)

If the dissenting opinion is correct in stating that the Supreme Court of Texas refused to enter upon any examination of the undisputed facts to ascertain whether such facts, as a matter of law, constituted contempt, then:

> Is an attorney deprived of due process of law and of the rights and privileges embraced in the concept of due process when he is summarily adjudged in contempt of court for having uttered certain words, when he is denied an opportunity even to inquire how or wherein it is thought that spch words are contemptuous, and when the only court in his jurisdiction to which he can appeal from the contempt judgment refuses to scrutinize his words to see if, as a matter of law, they could in any way serve as a basis for such a judgment?

(b)

If the Supreme Court of Texas examined the facts in the case and held that such facts evidenced a contempt, then:

Is an attorney deprived of due process of law and of the rights and privileges embraced in the concept of due process when he is summarily adjudged in contempt of court for having uttered certain words, and

(1) When the undisputed facts reveal that the words for which he was adjudged in contempt were words necessary for taking and preserving an exception to the conduct and language of the trial court?

(2) When the words allegedly were uttered in violation of an instruction of the trial court, but when the undisputed facts reveal that any such instruction was so vague and unintelligible as to make impossible an understanding of its nature or scope?

(3) When the judge who rendered the contempt judgment had, under the undisputed facts, cast aside his role of an impartial arbiter and had created and provoked the situation in which the words were spoken?

Reasons for Allowance of the Writ

The principal reason why this Honorable Court

should grant a writ of certiorari in this case is well stated in the opening paragraph of the dissenting opinion in the Texas Supreme Court (R. 40):

> "A question highly important to the bench, bar, and litigants is involved in this case. If, based upon the facts of this case, the majority opinion becomes the settled law of this State, then a trial judge by the exercise of arbitrary power could prevent an attorney from representing his client in a case on trial according to the duty which he owes his client."

The majority opinion of the Supreme Court of Texas appears to hold that a trial judge can in a direct contempt proceeding, fine and imprison an attorney, or any other person appearing before the court, for a good reason, for a bad reason, or for no reason, and that his action in so doing is not subject to review by any court in Texas so long as he had jurisdiction over the person of the alleged offender (a jurisdiction which is always present in true direct contempt situations) and so long as he had jurisdiction over the subject matter of the case before him (a jurisdiction which also seemingly would be ever present in a direct contempt situation). As is stated in the dissenting opinion, the Supreme Court of Texas appeared to hold:

> "that the relator is not entitled to obtain any relief in this Court under habeas corpus proceedings regardless of the lack of any probative evidence in the record showing that he was guilty of any contempt." (R. 48).

The certain and inevitable effect of the decision of the Supreme Court is to clothe each trial judge in Texas with the tyrannical powers of a Lord Jeffreys insofar as contempts are concerned. Under the decision of the Texas court, a trial judge may, with impunity and without the possibility of appellate review, adjudge an attorney or litigant to be in contempt because of malice, ill-temper or spite, or for any personal reason entirely apart from the case before him. Indeed, in the discussions with members of the Supreme Court of Texas which attended the proceedings herein, counsel for Petitioner inquired, in substance: "Is it the view of the Court that a trial judge could look at any attorney who was trying a case before him and say 'Mr. X, I do not like the color of your eyes. I find you to be in contempt of court, sentence you to three days imprisonment, and fine you $100.00 and costs"; and that if the trial judge had jurisdiction of the attorney's person—which he would have—and jurisdiction of the case on trial—which he presumably would have—that the Supreme Court of Texas would permit such a judgment to stand and would refuse to review the facts to determine if, as a matter of law, a contempt existed?" To this inquiry, the late Chief Justice of the Texas Supreme Court replied "That is an extreme case, but under our present views I think your question would be answered in the affirmative."

Such a situation is monstrous! The evils inherent in such a holding can find no better illustration than in the facts of the instant case. In the case at bar,

the Petitioner was stopped by the trial judge while he was arguing a case before a jury and was told to desist from making a certain argument. Petitioner attempted to obey the instruction and started to resume his argument. Again he was interrupted by the trial judge, and, when Petitioner attempted to inquire what, if anything, he was doing wrong, the trial judge made the following undignified and ungrammatical reply:

> "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides." (R. 15, 26).

With this statement being made before the jury, Petitioner had both a duty and a privilege to except to the language and conduct of the trial court. Indeed, under rules of civil procedure in Texas, Petitioner could not have preserved this matter for appeal in the case on trial unless he duly and timely took such an exception. Consequently, Petitioner respectfully excepted to the above quoted statement by the trial judge. The moment he uttered his exception, he was adjudged in contempt of court. What clearer example could there be of an imposition of punishment, not for any affront or insult to the dignity of the court, but merely because counsel had the courage to attempt to fulfill his duty to his client by objecting to the highly prejudicial statement of the trial judge? Under the whole of the undisputed evidence in this case, can a situation be envisaged which more patently reflects punishment inflicted upon an innocent and inquiring attorney by a choleric and partisan judge?

If the dissenting opinion is correct in averring that the Supreme Court of Texas refused to examine the undisputed facts in this case to determine whether or not such facts constitute contempt as a matter of law, Petitioner faces imprisonment and the payment of a fine solely by virtue of a summary judgment rendered by a judge who was himself a party to the controversy. It is Petitioner's basic contention that he has been deprived of due process because he has been accorded no trial on the merits of his case. Although the question does not appear to have been presented to this Honorable Court, the Supreme Court of Illinois has ruled in *Union Drainage District* v. *Smith*, 233 Ill. 417, 84 N. E. 376, that a statute violates due process if it compels a litigant to submit his controversy to a tribunal of which his adversary is a member. Surely such a ruling is eminently sound and wholesome! In a landmark case, this Honorable Court ruled in *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, that a litigant is denied due process if his liberty and property are subjected to the judgment of a judge who has a pecuniary interest in rendering an adverse judgment. Anger and vindictiveness on the part of a trial judge can lead as surely as pecuniary interest to an arbitrary and wrongful denial of justice and of due process! Hence, Petitioner submits that his "trial" in the district court was, within the standards of due process, no trial at all. With the Supreme Court of Texas refusing to examine the facts in issue or to exercise any powers of review with respect to the trial judge's action, Petitioner appears before this Honorable Court

convicted and sentenced, but untried. Petitioner seeks only to have some court review the facts upon which he has been convicted to ascertain if such facts possibly can support the judgment of conviction. If it be true that the Supreme Court of Texas refused to take such action, Petitioner prays that this Honorable Court accord him such a trial.

If, under the alternative interpretation of its opinion, the Supreme Court of Texas examined the facts alleged to constitute a contempt and held that such facts evidence a contempt, the denial of due process, and the need for review by this Honorable Court, remain apparent. Where an individual contends that he has been deprived by a state court of a fundamental right secured by the Federal Constitution, this Court has never hesitated to make an independent examination of the facts to ascertain if such a deprivation has occurred. Of the many decisions demonstrating this power on the part of this Honorable Court, the latest and perhaps the most apt is the recent decision in *Craig* v. *Harney*, 331 U.S. 367, 67 S. Ct. 1249, a decision which also involves action by a Texas Court. Once such an examination is made, can the Court say other than that Petitioner was punished solely for his action in excepting to the language and conduct of the trial court, and will the Court countenance such coercion of an attorney or such jeopardizing of the rights of his client? If there was any instruction given to Petitioner by the trial court, can Petitioner be deprived of his liberty and property for an alleged violation of such instruction without con-

travening the principle that "a person acting in good faith and with due respect to the court is not guilty of contempt if placed in a dilemma by an ambiguous order of the court"? See *N.L.R.B.* v. *Bell Oil & Gas Co., et al.*, 98 F(2d) 405. Can this Honorable Court review the record herein without observing as it did in *Cooke* v. *United States*, 267 U. S. 517, 45 S. Ct. 390, that "the case before us is one in which the issue bewteen the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows"? In the supporting brief attached hereto, Petitioner will cite additional authorities and will present arguments to the effect that questions such as these can only be answered in the negative.

Questions such as those stated above are most substantial. An answer to such questions will have effects far beyond the immediate effects upon Petitioner, for such an answer will profoundly affect every attorney and every litigant in the State of Texas and in every other jurisdiction in which there is danger of tyranny on the part of a trial judge. To the knowledge of Petitioner, this Honorable Court has never before been called upon to pass upon a situation precisely like the one at bar. However, the decisions of the Court in analogous situations afford strong reason for believing that Petitioner has been deprived of due process and is entitled to the relief which he seeks, while the zeal which this Honorable Court has shown in protecting an individual

from arbitrary or tyrannical action, be it judicial or otherwise, affords equally strong reason for believing that Petitioner will receive from this Court the relief which he seeks and to which, it is respectfully submitted, he is most certainly entitled.

Prayer

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued as provided by law to the Supreme Court of Texas, that the case be reviewed and determined by this Court, that the Petitioner have such relief in the premises as to this Court may seem just, and that the judgment of the Supreme Court of Texas be reversed by this Honorable Court.

Dated at Austin, Texas, April 19, 1948.

JOE J. FISHER
Petitioner

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No.

IN THE

Supreme Court of the United States

JOE J. FISHER,

Petitioner

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS;

Respondent

Supporting Brief on Petition for Writ of Certiorari

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The majority and dissenting opinions of the Supreme Court of Texas in this case (R. 33-52) are reported in 206 S.W. (2d) 1000. They have not yet been reported in the official reports of said Court.

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended; Title 28,

Section 344(b), U.S.C.A., upon the ground that the courts of Texas have denied to Petitioner due process of law and the rights and privileges embodied in the concept of due process, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Petitioner avers that the deprivation of due process by the courts of Texas which is involved herein presents a substantial question of the utmost importance because, quite apart from its effects upon him, it also affects most seriously the rights and privileges of every attorney and of every litigant in the State of Texas.

Petitioner has been imprisoned and fined by a district judge in Texas for certain words which he spoke while engaged in making a jury argument in a civil case then on trial (R. 14-15, 25-26). The suit on trial was a workmen's compensation case involving an injury to the left foot of a laborer. Under Texas law (Article 8306, Section 12, Revised Civil Statutes of Texas, 1925), the maximum recovery for a "specific injury" of this character is a recovery based upon a percentage of the average weekly wage for a period of one hundred twenty-five weeks. In the case under discussion, all parties had agreed that the average weekly wage of the injured laborer was $30.00 and that the compensation rate was $18.00.

In his argument, Petitioner first stated that the injury involved was a "specific injury". He then continued:

"The law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. That is the most compensation Anderson Godfrey could receive would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate—"

At this point Petitioner was interrupted by Mr. Joyce Cox, one of the opposing counsel—the opposing counsel consisting of Mr. Cox, Mr. John G. Seaman, and the trial judge's son, Mr. T. Gilbert Adams—and the following discussion ensued:

"Mr. Cox: Your Honor please—

"The Court: Wait a minute.

"Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

"The Court: That has all been agreed upon.

"Mr. Fisher: I think it is material, Your Honor, to tell the jury *what the average weekly compensation is* of this claimant so they can tell where he is.

"The Court: They are not interested *in dollars and cents.*

"Mr. Fisher: They are interested to this extent—

"The Court: Don't argue with me. Go ahead. I will give you your exception to it.

"Mr. Fisher: Note our exception."

"The Court: All right." (R. 14, 25)

At this point, Petitioner resumed his argument as follows:

"Mr. Fisher: This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, *at whatever compensation the rate will figure under the law.*

"Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

"The Court: Gentlemen. Mr. Fisher, you know the rule and I have sustained his objection.

"Mr. Fisher: I am asking—

"The Court: Don't argue with me. Gentlemen; don't give any consideration to the statement of Mr. Fisher.

"Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

"The Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

"Mr. Fisher: That is all right. We take exception to the conduct of the Court." (R. 14-15, 26)

Upon the making of the latter statement by Petitioner, the trial judge held him in contempt of court, and, by successive judgments, increased his punishment to the maximum of three days imprisonment and a fine of $100.00.

The trial judge stated in his contempt judgment that Petitioner was in contempt for continuing in a jury argument after being instructed by the judge to desist from making such argument (R. 26-27).

As is stated in the Petition for Writ of Certiorari submitted herewith the Supreme Court of Texas either refused to review the above facts to ascertain whether, as a matter of law, such facts evidence a contempt, or it reviewed the facts and found that a contempt was evidenced (R. 33-52). In either event, Petitioner contends that he has been denied due process of law by the Courts of Texas.

POINTS OF ERROR

Point One

If the Supreme Court of Texas refused to review the facts herein to ascertain whether such facts, as a matter of law, constitute a contempt, Petitioner contends that said Court erred since such action denied to Petitioner any character of trial on the merits of his case, contrary to due process of law.

Point Two

If the Supreme Court of Texas reviewed the facts herein and held that such facts evidenced a contempt, said Court erred because:

(a) The facts conclusively show that Petitioner was adjudged in contempt

solely because he excepted to the conduct and language of the trial judge, and any punishment for such an act is violative of due process of law.

(b) The facts conclusively show that if any instruction was issued by the trial judge pertaining to the jury argument such instruction either was obeyed by Petitioner or was so vague and unintelligible as to be incapable of understanding or of obedience, and any punishment for an alleged violation of such instruction is violative of due process of law.

(c) The facts conclusively show that Petitioner was adjudged in contempt by a judge who had cast aside his role of an impartial arbiter and who had provoked the controversy involved and had become a party to such controversy, in violation of due process of law.

Argument and Authorities Under Point One

The dissenting judge in the Supreme Court of Texas—a judge who sat in on the deliberations of that Court and who presumably was in the best possible position to know the attitude of the majority of the Court in this case—interpreted the opinion of the Court as holding that:

> "the relator is not entitled to obtain any relief in this Court under habeas corpus proceedings, regardless of the lack of any probative evidence

in the record showing that he was guilty of any contempt." (R. 49)

The First Point of Error herein is predicated upon the assumption that such an interpretation of the holding of the Texas Court is correct.

Since the earliest days of our jurisprudence, it has been elementary that a court cannot "make contempt of that which is not contempt." *Church, Habeas Corpus*, sec. 152.

Such a principle necessarily presupposes the existence of some reviewing authority to ascertain whether or not the court which entered the contempt judgment attempted to make a contempt out of facts which did not constitute such a contempt. Under the view that the Texas Supreme Court refused to make such a review of the facts herein, a situation is presented in which Petitioner has so far been deprived of the opportunity to have any court say whether or not the facts in his case do constitute a contempt.

Moreover, the overwhelming weight of authority in this country is to the effect that a contempt judgment rendered summarily in direct contempt proceedings is absolutely void unless it recites therein, specifically and with particularity, the facts alleged to constitute such a contempt. Sec. 154 *A.L.R.* 1227. In at least one case, *Terminal R. Assn.* v. *United States*, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150, this Honorable Court has set aside a contempt judgment

on the ground that the recitals contained therein were too vague and general to constitute a specification of facts amounting to contempt of court. The purpose of such a requirement obviously is to permit a scrutiny of the facts by a reviewing court for the purpose of ascertaining whether or not the facts constitute contempt. As is observed in the annotation in 154 *A.L.R.* 1227, as a summary of the decisions there cited and discussed:

> "The reason for the general rule that detailed facts must be set out in a judgment or order for direct contempt is that the courts, while recognizing the summary nature of direct contempt proceedings, try to limit to the absolute minimum the dangers inherent in such type of legal proceedings. Even a right to review in such cases constitutes no guaranty against unjust or arbitrary judgment if the reviewing court is not afforded an opportunity to evaluate the facts upon which the decision has been reached."

Similarly, with respect to the case at bar, it might well be observed that the right to review of a contempt judgment by habeas corpus—the sole remedy available in Texas in a situation such as this—affords no guaranty against an unjust or arbitrary judgment if the reviewing court, as seemingly did the Supreme Court of Texas, refuses to evaluate the facts upon which the judgment has been reached. This Honorable Court has always recognized that arbitrary action by a tribunal in the hearing of a cause or in its order violates due process. *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*,

224 U.S. 510, 32 S. Ct. 535, 56 L. Ed. 863. Upon a parity of reasoning it would appear that the refusal of a court to ascertain whether or not unjust or arbitrary action has been taken would also amount to a deprivation of due process.

Two other well established principles deserve attention in this connection. In a host of decisions, this Court has announced that the right of appeal or review is not essential to due process, provided due process has already been accorded in the tribunal which rendered judgment. See, *inter alia*, *District of Columbia* v. *Clawans*, 300 U.S. 617, 57 St. Ct. 660, 81 L. Ed. 843; *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244. The presence of due process in the tribunal which renders the judgment is necessary to call this principle into operation. Contrariwise, this Court has held that due process does not require an opportunity for a hearing prior to entry of judgment, provided a route of appeal or review exists wherein a full hearing may be had. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231; *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265. The presence of a full and complete review of the law and the facts is necessary to call this principle into operation.

In the case at bar, Petitioner was summarily adjudged in contempt by the district judge without any opportunity for a hearing, or for an explanation, and, indeed, Petitioner was not even permitted

to inquire how or wherein the trial judge thought him to be in contempt. Such action would not appear to be sufficient to constitute the measure of due process which suffices to obviate the need for a right of appeal or review. Contrariwise, under the assumption upon which this First Point of Error is discussed, the Supreme Court of Texas has refused to review the facts upon which the contempt judgment is based. Such action would appear to be insufficient to call into play the principle that a judgment entered without due process may be cured if a full hearing is afforded by way of appeal or review.

If there existed herein a dispute as to the facts which actually occurred in the trial court, a reviewing court might well refuse to disturb the view which the trial court took in resolving the factual dispute. However, no such situation is presented here. In the instant situation there is no dispute about the facts which actually occurred in the district court, and, absent any such dispute, there cannot be invoked any principle to the effect that the reviewing court will not disturb the trial court's judgment on disputed facts. Thus, for example, if Petitioner were charged with having made a disrespectful gesture towards the trial court, or with uttering disrespectful language, and if Petitioner denied making the gesture or uttering the language, the trial court's finding on such matter might well be permitted to stand. In the present case, however, the facts are undisputed and they speak for themselves. The sole question—and the question

which the Supreme Court of Texas has answered in the affirmative—is whether the judgment of the trial court may be permitted to stand when the undisputed facts reveal a total lack of probative evidence to support such judgment.

As Petitioner has stated in his Petition for Writ of Certiorari submitted herewith, it does not appear that this Honorable Court has ever before been called upon to say whether the lack of review of the undisputed facts upon which a summary contempt judgment is based constitutes a deprivation of due process. While the question appears to be novel, the legal principles by which such a question should be answered are both ancient and elementary. Unless such lack of review is violative of due process, the maxim that "a court cannot make a contempt of that which is not a contempt" becomes a mockery, for any trial judge can so fabricate a contempt and can do it with impunity and without fear of review. Unless such lack of review is violative of due process, the requirement that the facts allegedly constituting a direct contempt be set forth specifically in the contempt judgment is an idle gesture, for an accused may be adjudged and held in contempt regardless of what such facts show. Unless such lack of review is violative of due process, a half-way trial in the court which entered the judgment and a half-way appellate review seemingly may be added together to produce the whole of due process, and the guarantees of the Fourteenth Amendment may thereby be stultified.

Argument and Authorities Under Point Two

If what the Supreme Court of Texas actually did in its treatment of this case was to examine the undisputed facts and hold that such facts evidence a contempt, Petitioner submits the three subdivisions of his Second Point of Error for consideration by this Honorable Court. In numerous decisions this Court has announced the principle which was thus stated in *Craig* v. *Harney*, 331 U. S. 367, 67 S. Ct. 1249:

> "In a case where it is asserted that a person has been deprived by a State court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made."

When such an examination is made with respect to the undisputed facts herein, Petitioner submits that his deprivation of due process is clearly revealed by reason of each of the three matters set forth and argued below:

Point (2a): According to the contempt judgment, Petitioner was adjudged in contempt because of his alleged action in persisting in a jury argument after being instructed to cease such argument (R. 26-27).

In fact, the record herein shows that the occurrence for which Petitioner actually was adjudged in contempt—the occurrence which touched the tinder to the trial judge's temper—was his action in

excepting to the judge's conduct in stating before the jury, "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides."

If Petitioner actually persisted in an improper jury argument, he did so several statements prior to the time when he was adjudged in contempt. If this was his actual offense, strange indeed is the fact that he was not held in contempt at the time of its commission. Stranger still, and far more indicative, is the fact that the contempt judgment occurred only when he took an exception to the conduct of the trial judge—an action which was necessary to preserve the matter for appeal. Apt indeed is the admonition, universally recognized, to the effect that "the power to punish for contempt should be exercised with great caution, and not as a vindictive measure." *Herring* v. *Houston Nat'l Exchange Bank*, 113 Tex. 337, 255 S.W. 1097.

If it be true that Petitioner was punished because he excepted to the conduct of the trial court, is punishment of such character violative of due process? Again, Petitioner confesses that he knows of no instance in which this or any court has been called upon to answer such a question. In *Ex parte Crenshaw*, 259 S.W. 587, 31 A.L.R. 1131, the Texas Court of Criminal Appeals—the court of last resort in criminal matters in that jurisdiction—vigorously condemned the action of a trial judge in punishing an attorney for contempt because the attorney was attempting to except to a remark by the judge in the presence of the jury, but the court did not dis-

cuss the question of due process. While the effect of the element of due process in a case of this character presents a question of first impression, such question would appear to be deserving of only one answer.

At the very foundation of any concept of due process is the right to a full and impartial trial for the redress of all injuries. In Texas, as in all other jurisdictions, a judgment in favor of one party will be set aside if it appears that the trial judge in the presence of the jury made remarks which were prejudicial to the losing party. *Southland Greyhound Lines, Inc.*, v. *Matthews*, 74 S. W. (2d) 713. Likewise, as is shown by the case last cited, an exception to such remarks must be taken if they are to be assigned as error upon an appeal.

It can scarcely be thought that due process would be present if a trial judge denied to one party the right to except to his remarks, while permitting such exceptions by the other party. Likewise, it can scarcely be thought that due process is present when a trial judge is permitted to penalize counsel for taking such an exception by adjudging him in contempt or to coerce him in like manner into refraining from taking future exceptions. Consequently, Petitioner respectfully submits that he was held in contempt solely because he excepted to the conduct of the trial judge, that he possessed both a duty and a privilege to take such exception, and that the judgment of the trial court constituted an unconstitutional impediment in the way of the performance

of his duty and an equally unconstitutional infringement of the exercise of his privilege.

Point 2(b): Although the facts in this case clearly reveal that Petitioner was adjudged in contempt for his action in excepting to the conduct of the district judge, rather than for any action in disobeying an order or instruction of such judge, let us, for purposes of argument, see if there is any possible way by which Petitioner could be held guilty of disobeying any order or instruction of the trial judge without violating due process.

It is elementary that an order or instruction is incapable of obedience if it is vague or unintelligible. Moreover, as the Circuit Court of the Fifth Circuit observed in *N.L.R.B.* v. *Bell Oil & Gas Co.*, 98 F(2d) 406:

> "If placed in a dilemma by an ambiguous order, one who acts in good faith and with due respect to the court is not guilty of contempt."

The present inquiry is made clear by an item by item examination of the facts herein (R. 14-15, 25-26). The incident involved in this case started when Petitioner began to tell the jury that the injured negro would recover compensation at the rate of the "average weekly compensation rate" for a period of one hundred twenty-five weeks. At this point, Petitioner was about to tell the jury that the agreed compensation rate was $18.00 per week—information which would have enabled the jury to make the mathematical computation of 125 times $18.00 and

thereby to obtain the dollars and cents figure of the maximum recovery.

Petitioner was interrupted by opposing counsel prior to giving the dollars and cents figure of the compensation rate, and the trial judge observed:

"That has all been agreed upon."

The only thing which had been agreed upon was the fact that the negro's compensation rate was $18.00. Hence, the judge's remark could only have been referable to a statement of the actual amount of the rate.

Following this, Petitioner said:

> "I think it is material, Your Honor, to tell the jury *what the average weekly compensation is* of this claimant so they can tell where he is."

Here again, the conversation referred only to a statement of the $18.00 rate—the actual dollars and cents figure. This is confirmed by the fact that the trial judge immediately responded:

"They are not interested in dollars and cents."

At this point the entire conversation had been with respect to Petitioner's prospective statement to the jury that the rate for the injured negro was $18.00. If there was any instruction given by the trial judge, it was an instruction not to tell the jury that the rate was $18.00—that "they are not interested

in dollars and cents." If there was any implication which could be drawn from the trial judge's remarks, it was an implication which forbade the giving of any information whereby the jury could, by a mathematical computation, ascertain the actual dollars and cents figure of the maximum recovery.

Petitioner took an exception to the trial judge's ruling on this point and continued his argument as follows:

> "This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, *at whatever compensation the rate will figure under the law.*"

If there was any violation of any order or instruction by the trial court pertaining to the jury agreement, it occurred when counsel made this statement. Yet of what did the statement consist? Petitioner desisted from giving the jury the dollars and cents figure of the compensation rate, or from giving them any information whereby a mathematical computation would have revealed the dollars and cents figure of the maximum recovery. In lieu thereof, Petitioner substituted the harmless statement that recovery would be "at whatever compensation the rate will figure under the law". In so doing, he thought he was complying with the instruction and desires of the trial court. When the trial judge also objected to this statement, Petitioner for the first time realized that perhaps the trial judge had instructed him to do something other than to refrain

from giving the dollars and cents figure of the rate, and Petitioner started to inquire just what the trial judge did mean. Thus, Petitioner said:

"I am asking—"

Again he was interrupted by the trial judge, with the judge saying:

> "Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

If the trial judge actually meant to instruct Petitioner not to make any argument at all concerning the computation of the amount which the negro might recover, his language was at the very least most ambiguous in this respect. Certainly the most reasonable construction to be placed upon such language was to interpret it, as did Petitioner, as only forbiding a statement of the dollars and cents figure of the compensation rate. Certainly, also, Petitioner was placed in a most vexing dilemma by the judge's instruction. When it appeared that the judge might have meant something by his language which was not apparent from the words spoken by him, Petitioner attempted to inquire just what the judge meant, and was prevented from so doing. What could Petitioner reasonably have done other than that which he did? He obeyed the order as he understood it—and, it is submitted, as any reasonable person would have understood it—and, when it became apparent that he must have misunderstood

the scope of the order, he attempted to inquire what was meant and was prevented by the trial judge from so doing.

Everything about the dialogue between Petitioner and the trial judge reveals that Petitioner acted in good faith and with due respect when he resumed his jury argument. If in any way he disobeyed such order, he did so only because the order was absolutely ambiguous with respect to the meaning which the trial judge apparently intended it to convey.

Again, from the standpoint of a deprivation of due process, specific authorities on this question appear to be lacking. In *Terminal R. Assn. of St. Louis* v. *U.S.*, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150, this Honorable Court held that a decree or order will not be expanded by implication in contempt proceedings, beyond the meaning of its terms when read in light of the issues and the purpose for which the suit was brought, and that the facts found must constitute a plain violation of the decree or order so read. Likewise, the decisions of numerous state courts, as summarized in 17 *C.J.S.* p. 16, are to the effect that:

> "a party cannot be punished for failure to obey an order which is contradictory, or for failing to do something not specified in the order, or for doing something not forbidden by the order, nor should a party be punished for disobedience of an order which is capable of a construction consistent with innocence."

Although the decisions announcing the above principles do not specifically allude to due process, considerations of due process necessarily must underly the statement of such principles. Can it be said that it would be due process to expand the instruction of a trial judge beyond its ordinary meaning and then to punish an individual for disobeying the order as so expanded? Can it be said that it would be due process to punish an individual for disobeying an instruction which is so ambiguous that it cannot reasonably be understood to forbid the act which he performed? Can it be said that it would be due process to punish for violating an instruction when the instruction did not forbid the action which he took or the words which he uttered? The answers to these questions are obvious, and such answers point squarely to the need for a holding herein to the effect that any punishment inflicted upon Petitioner for disobeying any instruction of the trial court likewise is violative of due process.

Point 2(c): From the undisputed facts in this case, it is apparent that the trial judge provoked and participated in the controversy involved in a manner which was scarcely in keeping with the rendition of impartial justice. Throughout the dialogue between Petitioner and the trial judge there appears no statement or act which could be deemed in any way unseemly until the point when Petitioner attempted to inquire just what the trial judge meant by his ruling and was prevented from so doing by the trial judge's statement:

> "Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

Immediately thereafter, and prior to the time that there could possibly have been any objectionable statement made by Petitioner, the trial judge added:

> "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides."

One can only speculate as to the reasons for the ill-temper and the obviously biased attitude of the judge in this case. Petitioner's client was a negro —perhaps that was the reason. Perhaps the fact that one of the opposing counsel was the trial judge's son was also a not negligible factor, for it was this same combination of father on the bench and son before the bar that not so long before had been censured by the Supreme Court of Texas in *Postal Mutual Indemnity Co.* v. *Ellis*, 169 S.W.(2d) 482. However, regardless of the reasons for the attitude of the trial judge, prejudice on his part plainly was present and was evidenced in his every word.

In the usual contempt situation—that of a constructive contempt—the judge has only a detached and impersonal interest in the injunction which he has issued, and can determine impartially whether or not such injunction has been disobeyed. Far different is a controversy which involves a fancied slight to the feelings of the judge or a controversy in which the judge has become one of the disputants.

An elementary requirement of due process is that a tribunal which renders a particular judgment must be an impartial one. *Buck* v. *Bell*, 143 Va. 310, 130 S.E. 516, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 100. A statute requiring an individual to submit his case to a tribunal of which his adversary is a member has been held not to afford due process of law. *Union Drainage Dist.* v. *Smith*, 233 Ill. 417, 84 N.E. 376. This Honorable Court has held unconstitutional any situation in which the property or liberty of an individual are subjected to the judgment of a court in which the judge has a direct and substantial pecuniary interest in the judgment. *Tumey* v. *Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749. Just as pecuniary interest in a judgment may prove a compelling force for the rendition of an inequitable or biased judgment, so also, it is respectfully submitted, may anger or vindictiveness prove an equally compelling force.

In this connection, the decision by this Honorable Court in *Cooke* v. *United States*, 267 U.S. 517, 45 S. Ct. 390, is highly pertinent. The *Cooke* case differs from the case at bar in that it was a constructive contempt situation in which due process was found lacking because the accused was not afforded a proper opportunity to prepare his defense, secure counsel and call witnesses, etc. However, the *Cooke* case is similar to the instant case in another respect for there, as here, the facts reveal a trial judge whose personal feelings were injured, a trial judge who entered into the dispute, a trial judge who repeatedly refused to permit the alleged contemnor

to inquire into the nature of his alleged offense or to make the most simple of statements or explanations. In reversing the contempt judgment, this Court stated:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward, and injure the authority of the court by too great leniency. . . .
>
> "The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

Similarly, the case at bar is one in which the record abundantly reveals marked personal feeling on the part of the judge and a total absence of any impartial or calm judicial consideration and conclusion.

Conclusion

Even though the penalties which have been in-

flicted upon this Petitioner are relatively light, a judgment of contempt is far from being a trivial matter. In the case of an attorney, such judgment may well be tragic, for the judgment may inflict irreparable injury upon his practice, or may, at the very least, lead to extreme embarrassment and to a loss of respect in the community in which he resides. If a contempt has in fact been committed, these are the inevitable concomitants of the offense, but where no contempt has been committed, severe and unfair indeed are these consequences of a contempt judgment.

It is unthinkable that there can be no remedy or relief for such a situation—that an unfair or ill-tempered judge may safely and without review by an appellate court pronounce a judgment of contempt upon any state of facts so long as he is careful to enter a proper order and commitment. It is also unthinkable that a trial judge should be permitted to fabricate a contempt by labelling certain acts as such when the undisputed facts evidence the absence of any contempt. Petitioner cannot believe that this is the law, or that such procedure constitutes due process of law. Neither can Petitioner believe that this Honorable Court will sanction such action.

Petitioner knows that this Honorable Court will carefully review this case, as it does all other cases, but in view of the extreme gravity of a situation of this character, Petitioner respectfully urges that the Court give especial attention to the principles

which it enunciates herein, to the end that an attorney may know that he may safely represent his clients in a respectful manner and within the bounds of proper trial procedure without the risk of an unwarranted and unreviewable judgment of contempt, and to the further end that attorneys and all others may know that the revered principle of upholding the dignity of the courts may not be used as a cloak to conceal venom or personal spite.

WHEREFORE, Petitioner prays as in his Petition for Writ of Certiorari.

Respectfully submitted,

JOE J. FISHER,
Petitioner

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No. 45

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOE J. FISHER,
Petitioner,

VS.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,
Respondent

SUPPLEMENT TO PETITIONER'S BRIEF

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Respondent

SUPPLEMENT TO PETITIONER'S BRIEF

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner has heretofore filed a brief in support of his Petition for Writ of Certiorari, and it has been Petitioner's intention to stand on such brief, rather than to file any additional argument or memorandum of authorities. However, that brief was pre-

pared prior to the time that Petitioner had received a report of this Court's decision in *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499 (1948). At least three aspects of that decision are so pertinent to the case at bar that Petitioner is filing this short discussion of the *Oliver* case as a supplement to the authorities and arguments contained in his original brief.

I.

In the first question set forth in his Petition for Writ of Certiorari and in the first point of his supporting brief Petitioner discussed the fact that the decision of the Supreme Court of Texas—as such decision was construed by the dissenting judge in that Court—reflects a refusal on the part of that Court to examine the record in a summary contempt case to see if such record contains any probative evidence which would support the contempt judgment, and Petitioner argued that such refusal is violative of due process.

In his opinion in the *Oliver* case, Mr. Justice Frankfurter points out that a summary contempt judgment is not violative of due process "provided that the State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding." Following this statement, Mr. Justice Frankfurter continues:

"But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not

be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting."

The relevance of this language to the instant situation is patent. In the case at bar, the Supreme Court of Texas was the only tribunal before which Petitioner had an opportunity to obtain a hearing. Yet when Petitioner appeared before that Court he found himself most severely handicapped by the Court's refusal to examine the facts to see whether a contempt had, as a matter of law, been committed, and by the Court's philosophy that:

"Whether he committed the act charged is conclusively determined by the order or judgment of the trial court in the proceeding wherein he is adjudged in contempt, provided that court possessed jurisdiction. We may consider the facts only for the purpose of determining whether they constituted acts sufficient to confer jurisdiction upon the court to make the particular order." 206 S. W. (2d) 1000, 1003.

Hence, if an opportunity for a full and complete trial is a requisite of due process—and this Honorable Court so held in the *Oliver* case—Petitioner plainly was deprived of both liberty and property without due process by reason of the fact that the Supreme Court of Texas examined the facts in his case solely for the purpose of discovering jurisdic-

tion and refused to examine such facts to ascertain whether they constituted a contempt.

II.

In the *Oliver* case this Court repeated and emphasized its earlier statements that summary punishment for contempt may be had only in the event of what the Court termed "court-disrupting misconduct," and the Court entered into an examination of the facts to ascertain whether any such misconduct existed. No such misconduct is present in the case at bar. Rather, Petitioner, as an attorney engaged in representing the interests of his client, attempted to inquire as to the scope of the court's ruling and, when he was prevented from so doing, took an exception to the language which the court used in so preventing him. The contempt judgment followed the taking of this exception. Instead of constituting "court-disrupting misconduct," Petitioner's actions prior to the contempt judgment were actions which were essential to an understanding of the court's ruling and to the preservation of his client's interests. Obviously, Petitioner could not properly proceed with the trial unless he understood the scope of the ruling about which he attempted to inquire. Obviously also, Petitioner could not stand idly by and permit his client's interests to be jeopardized by waiving an exception to the court's intemperate language. Consequently, with the requirement of "court-disrupting misconduct" being reiterated and

stressed in the *Oliver* case, Petitioner submits that the erroneous nature of the decision of the Supreme Court of Texas is plainly revealed.

III.

As is pointed out by the writer of a note in 48 *Columbia Law Review* 813, 814, this Court, in the *Oliver* case, quite properly did not find it necessary to pass upon the constitutionality of a situation in which a trial judge adjudicates upon the basis of his own accusation. In *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, in a similar situation in which the judge who imposed the contempt judgment was also an active participant in the facts which surrounded the alleged contempt, this Court remanded the case with instructions that it be reheard before some judge other than the one who participated in the dispute. In the case at bar, the dissenting judge expressed the view that Petitioner could not have been accorded a fair trial by "a judge who had lost his judicial poise and fairness" (206 S. W. (2d) 1000, 1011), and, in the *Columbia Law Review* note above referred to, the writer concluded:

"It would be desirable in such cases that, in addition to the protection against secret and summary punishment, an alleged contemnor be afforded a hearing before a judge other than his accuser."

As Petitioner has contended in his Petition for Writ of Certiorari, just as pecuniary interest in a judgment may prove a compelling force for the ren-

dition of an inequitable judgment and may thereby be violative of due process, so also, it is respectfully submitted, may anger or vindictiveness prove an equally compelling force, and the presence of such anger and vindictiveness—as plainly revealed by the record—deprives the judgment herein of any element of due process.

WHEREFORE, Petitioner prays as in his Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1947

No. 756

JOE J. FISHER, *Petitioner*,

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 756

JOE J. FISHER, *Petitioner*,

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The Trial Court's order was " * * * that he, the said Joe J. Fisher, is guilty of contempt of Court in so refusing to abide the ruling of the Court and in arguing with the Court and in manifesting disrespect for the Court, its authority and its orders" (R. 27).

The majority opinion (8 of 9 Judges) of the Supreme Court of Texas is not ambiguous, or susceptible of the interpretation that the Court refused to consider the Record. Its own clear statement of the scope of its inquiring was: "If there is any conduct or behavior of the relator contained in the whole proceedings sufficient to constitute a contempt which was within the power of the court to punish, our inquiry comes to an end." (R. 36-7.) It reviewed Petitioner's conduct, ranging from initial improper jury argument, through determined disobedience of the Trial Court's rulings and orders with respect thereto, and finally to defiant and disrespectful recalcitrance, and found therein sufficient jurisdictional grounds to support the Trial Court's order.

We have, therefore, that class of contempt which MR. JUSTICE HOLMES in CRAIG v. HECHT, 263 U.S. 255, at 280, distinguishes from those involved in cases cited by Petitioner:

> "For we must not confound the power to punish this kind of contempts with the power to overcome and punish disobedience to or defiance of the orders of a court, although unfortunately both are called by the same name. That of course a court may and should use as fully as needed. * * *."

Counterpoints

1. Petitioner never contended to the Supreme Court of Texas that it did not consider the record and find therein sufficient basis, in its judgment, to justify the contempt judgment. (Responsive to Petitioner's Point One.)

2. The Supreme Court of Texas reviewed Petitioner's conduct and found therein cause sufficient

to empower the Trial Court to determine and punish contempt, the Supreme Court's action in this respect satisfying every requirement of due process. (Responsive to Petitioner's Point One.)

3. The Supreme Court of Texas sustained action by the Trial Court, justified by contemptous disregard of that Court's lawful authority and rulings; and the Supreme Court's action in this respect was not offensive to any requirement of due process. (Responsive to Petitioner's Point Two.)

4. Exercise of jurisdiction by this Court to reverse the action of the Court below would constitute an unjustifiable interference in the administration of justice by the Courts of Texas pursuant to the laws of that State, and as a precedent tend strongly toward making difficult the maintenance of order, dignity and decorum in Court proceedings in that and other States. (Responsive to Petitioner's Points One and Two.)

Argument

Our points are so intimately related that to argue one is to argue the others; separate argument would involve repetition.

We have pointed out, in our preliminary statement, that the punishment was for disregard of the Trial Court's orders and rulings, and a refusal to conform to the Trial Court's requirement that Counsel stay within the bounds of propriety. Both Courts below made this point very plain; and the argument that the punishment was for taking an exception, or for improper and personal reasons of the Trial Judge, or some other speculative reason, are contrary both

to the record and the presumptions of right conduct and motivation that should prevail.

Before analyzing the occurrences in the Trial Court, we wish to stress that the Supreme Court analyzed the record and found it reflected contempt within the jurisdiction of the Trial Court to punish. Nothing could be plainer. The dissenting Judge must not have read the majority opinion; indeed it is plain that it is his mistake, in this respect, and not any view of his own, which leads the Petitioner to the assertion of his Point One. *Nowhere, did he assert to the Supreme Court of Texas any such claim.*

The only presentment of Federal question, in the proceedings filed in the Supreme Court, was in Paragraph VII (b) of the Supplemental Petition (R. 6), on a ground not now argued to this Court. In Petitioner's Motion for Rehearing, he disclaimed all challenge to any "single proposition of law set forth in the opinions of the Court", and simply argued that "the majority * * * has viewed the facts * * * other than in their true perspective * * * and solely on this ground * * * *" moved for rehearing (R. 53). In his Supplemental Motion for Rehearing, his grounds II to VI, inclusive, he invokes Federal Law, contending only that the Supreme Court of Texas erred in its conclusions and actions on the facts, and never contending that the Supreme Court violated Federal Law by refusing to consider the facts. Accordingly, Petitioner's afterthought, his Point One, is improperly raised; but were its consideration proper, it is not well taken; for the Supreme Court considered the facts and viewed them substantially as we will shortly present them.

The foregoing is only the beginning of Petitioner's jurisdictional difficulty. Admitting (Brief, 23) that due process does not, as held in DISTRICT OF COLUMBIA v. CLAWANS, 300 U.S. 617, 627, "comprehend the right of appeal", he

complains that the Supreme Court of Texas did not make an independent review of the facts and disagree with the Trial Judge, a scope of review never indulged even in the widest appeal. Essentially, he asserts he was denied due process because he was not allowed an appeal with *de novo* evaluation of the facts, instead of being accorded the traditional jurisdictional inquiry of a *habeas corpus proceeding*.

We submit that the Supreme Court of Texas gave the correct scope of review, and that this Court need and should not inquire as to whether its judgment involves error. As said in BELL TELEPHONE COMPANY OF PENNSYLVANIA v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The meaning of what transpired in the Trial Court can be understood from the background of Texas law, and the precise situation in the particular trial. The case at issue was a Workmen's Compensation Action, arising under VERNON'S CIVIL STATUTES OF TEXAS, Article 8306, et seq. A jury was sitting. The issues had been narrowed, by stipulation, to the question of the extent and duration of the plaintiff's incapacity resulting from an injury to his foot. Seven special issues designed to elicit an answer to this problem, and no others, were submitted (R. 10-12), with instructions including the following:

> "You are the sole and exclusive judges of the facts

proved, the credibility of the witnesses, and the weight to be given their testimony; but the law you will receive from the Court as contained in this charge and be governed thereby.

"You must not discuss or consider what effect any of your answers may have upon the rights of the parties nor the judgment that may be rendered by the Court in this case, as it will be the duty of the Court to determine those matters."

As pointed out by the Supreme Court of Texas in its opinion in the instant case, EX PARTE FISHER, 206 S.W. (2d) 1000, 1004 (R. 38), special issue submission has as its purpose limiting the jury to decision of disputed facts and preventing them from considering or discussing whether they should render a verdict for one party or the other. The instruction of the Trial Court correctly stated the Texas law.

Any qualified Texas Lawyer, with proper regard for the Law and the Court's Charge, in addressing a jury after the charge had been read (VERNON'S TEXAS RULES OF CIVIL PROCEDURE, Rule 269), would:

Limit his address to the issues submitted, namely the extent and duration of plaintiff's disability, and the evidence bearing thereon.

Refrain from discussing issues, and facts bearing thereon, which the Court's charge, as well as the law, withdrew from the jury's consideration.

Refrain from inviting the jury to disregard the Court's charge by considering issues not before the jury or evidence bearing thereon.

Refrain from arguing to the jury, causing them to disregard the Court's instruction not to consider or discuss such matters, the effect their answers would have upon the rights of the parties or the judgment to be rendered by the Court.

Refrain from urging, directly or by implication, that the jury award the plaintiff compensation measured in either time or money.

With the Court's charge before him, Mr. Fisher's opening remarks were in open disregard thereof, and either a deliberate or ignorant violation of the duty any lawyer owes the profession and the Court in the particulars above summarized. He told the jury the maximum compensation Godfrey might receive under judgment of the Court, and how it would be computed, depending upon their answers (R. 14).

The objection and ruling were:

"By Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

"By the Court: That has all been agreed upon.

"By Mr. Fisher: I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

"By the Court: They are not interested in dollars and cents.

"By Mr. Fisher: They are interested to this extent—

"By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

"By Mr. Fisher: Note our exception.

"By the Court: All right." (R. 14.)

Note that the objection sustained was that "the jury is not concerned with the computation. That is not before the jury." Counsel knew full well what was before the jury: The Court's charge was in his hand; and he was a competent practicing attorney, fully aware of the requirements of Texas Law and his duty as an officer of the Court. He admitted that his purpose in making the argument was in direct vio-

lation of the Court's charge, to induce the jury to consider the measure and amount of Godfrey's recovery, in his words:

> " * * * to tell the jury what the average weekly compensation is of this claimant so they can tell where he is."

At the close of the foregoing ruling, with proper observance of decorum by the Petitioner, as the Court's officer, the incident should have closed; but it did not. Mr. Fisher's first words thereafter, " * * * This negro, *as I stated,* can recover * * * ", were an incorporation of his previous remarks, which the Court had instructed the jury to disregard, an argument that the jury should disregard the Court's instruction, and an attempt to disobey the Court's ruling previously made. The related text is (R. 14):

> " * * * This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.
>
> "By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.
>
> "By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.
>
> "By Mr. Fisher: I am asking—
>
> "By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

Here again the incident should have ended. The issue was settled a second time, the Court's ruling was made, and though counsel had deliberately disobeyed rulings of the Court, the Court had merely performed his necessary judicial function and warned counsel not to argue about it. The next step is the noting of an exception, an unnecessary pro-

cedure (VERNON'S TEXAS RULES OF CIVIL PROCEDURE, Rule 373), and a disobedience of the Court's instruction not to argue (R. 15):

> "By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury."

The following then occurred (R. 15):

> "By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.
> "By Mr. Fisher: That is all right. We take exception to the conduct of the Court."

Cold print cannot depict expression and inflection; otherwise the record might contain what presumption must supply, namely the affront to the Court's dignity contained in the utterance of the phrase "That is all right." It was this which was the culmination of the causes moving the Court to impose the $25.00 fine as appears from the following (R. 15):

> "By the Court: That is all right; I will fine you $25.00."

There follows a charge by Mr. Fisher that the Court is fining him "for trying to represent my client," an attempt to reargue the improper matter, insistence that the Court was acting for his own "satisfaction" and because he knew he held the advantage, and a culminating demand for right to state position before the "audience" (R. 15):

> "By. Mr. Fisher: If that will give you any satisfaction.
> "By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the clerk $50.00.

"By Mr. Fisher: You mean for trying to represent my client?

"By the Court: No, sir; for contempt of Court. Don't argue with me.

"By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument—

"By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.

"(fol. 22) By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.

"By the Court: That will be a hundred dollar fine and three days in jail. Take him out.

"By Mr. Fisher: I demand a right to state my position before the audience.

"By the Court: Don't let him stand there. Take him out."

In the foregoing progression, improper argument to disobedience to explicit insult, we have the traditional basis for the long-established type of punishment assessed by the Trial Court.

The power of a Trial Court to punish summarily for contempt committed in its presence is an anciently recognized and still essential power. EX PARTE TERRY, 128 U.S. 289, 302-304; BEVAN v. KRIEGER, 289 U.S. 459, 465; ELLENBECKER v. PLYMOUTH COUNTY, IOWA, 134 U.S. 31. A related habeas corpus proceeding is collateral, as held by the Court below, and as it has been from ancient origins, and cannot prevail unless the contempt order was void. EX PARTE TERRY, supra, 306-8. The findings of the Court of first instance, where the facts are such as to confer jurisdiction to make the determination, cannot be revised or annulled by another court on application for habeas corpus (IBID. 310). "Confidence

must be reposed somewhere," EX PARTE KEARNEY, 7 Wheat. 38, 45, quoted in EX PARTE TERRY, supra, 309. See also UNITED STATES v. MOORE, 294 Fed. 852, certiorari denied, 264 U.S. 581.

These procedures of contempt and habeas corpus were established long prior to the enactment of the Fourteenth Amendment, and were not prohibited thereby. PLLENBECKER v. PLYMOUTH COUNTY, IOWA, 134 U.S. 31, 36-39; BIVAN v. KRIEGER, 289 U.S. 460; RUBIN v. STATE, 192 Wis. 1, 211 N.W. 926; MCCARTHY v. CLANCY, 110 Conn. 482, 148 A. 551.

Accordingly, the Supreme Court of Texas, on the record, took such action as has long been recognized as proper by this and other Courts. With this, we close, with a request that this Court disregard certain factual charges and insinuations contained in the Petition and supporting brief and which have no basis in the record. Particularly, we allude to the *ex parte* relation of an off-the record conference between the Court and Petitioner's Counsel (Petition, p. 9), at which the case was discussed and Respondent was not represented, in which conference, startling in its very occurrence if it occurred, astonishing words came from the mouth of our late highly respected Chief Justice, which words are contrary to the opinion he and his colleagues wrote. The baseless and ugly conjecture concerning racial animosity, and allusion to a relationship which is not improper, and a censure thereof in POSTAL MUTUAL INDEMNITY CO. v. ELLIS, 169 S.W. (2d) 482, in which no such censure appears (Brief, 35), are of similar nature. Speculation, and accusation of a nature with the spirit manifested by Petitioner in the contempt episode, are used to direct attention from the plain facts of record and their meaning.

WHEREFORE, Respondent prays that the Court refuse to

issue its Writ of Certiorari in this cause, and that all other relief sought by Petitioner be denied.

Respectfully,

R. C. PACE,
Sheriff of Jasper County, Texas,
Respondent;

R. C. Pace

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No. 45

IN THE

SUPREME COURT OF THE UNITED STATES

JOE J. FISHER,
Petitioner

vs.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,
Respondent

On Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR REHEARING

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No. 45

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

JOE J. FISHER,
Petitioner

VS.

R: C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,
Respondent

On Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR REHEARING

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner is more than satisfied with the careful consideration which the Court has given this case. The question asked by the various Justices during the oral argument reflected complete familiarity with the record, and the opinions of the Court evi-

dence the study and the research which have been accorded the case. Consequently, it is with no sense of complaint and with considerable hesitancy over further encroaching upon the time of the Court that Petitioner presents this his Petition for Rehearing and respectfully requests the Court to reconsider its decision of February 7, 1949, to withdraw its opinion and judgment of said date, and to render judgment in his behalf. This Petition is based upon the following grounds and arguments:

I.

The majority of the Court stated on page 6 of its opinion that:

"In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

From this statement and from the fact that Mr. Justice Douglas also alludes to demeanor in his dissenting opinion, Petitioner gathers that the Court is of the opinion that the transcript of the record conveys nothing concerning his expression or attitude when he spoke to the trial court, and that the Court is, at the very least, indulging in a presumption that his expression or attitude may have given his words a contemptuous flavor which the words themselves do not reveal.

If a situation in which the record reflects nothing concerning demeanor there doubtless is room for a presumption such as that mentioned above. However, the record in the case at bar is replete with evidence that Petitioner conducted himself as a gentleman throughout his colloquy with the trial judge and that he at no time demonstrated any disrespect, anger or intemperance towards the trial judge. Thus, on pages 16 and 17 of the record are contained an affidavit executed by all twelve of the jurors who were hearing the workmen's compensation case in which the allegedly contemptuous incident occurred. In the printed record, the names of only nine of the jurors are shown, and there are three blank lines. When the record was transcribed, counsel for Petitioner was told that the blank lines indicated illegible signatures. Lest there be any doubt about the matter and lest this Court believe that only nine of the twelve jurors executed the affidavit, there is transmitted herewith a certificate by the Clerk of the Supreme Court of the State of Texas reflecting the fact that the original affidavit on file in his office contains the signatures of all twelve jurors. In this affidavit the jurors, after reciting the facts pertaining to the contempt, state:

"nor at any time did Mr. Fisher raise his voice or conduct himself in such a manner that indicated disrespect for the Judge presiding; but rather on the other hand, Mr. Fisher at all times during the argument and ensuing colloquy with Judge Adams acted with dignity, spoke in moderate tones, indicative of respect for the court, and conducted himself in every respect as a gentleman."

Similarly, on pages 17 to 20 of the printed record, are three affidavits from bystanders at the trial in which the allegedly contemptuous incident occurred. The three bystanders also unite in saying that:

"He [Mr. Fisher] did not demonstrate any anger or temper. He did not raise his voice at any time he was talking to Judge Adams and did not talk in a discourteous or insulting manner, and did nothing which I would consider conduct unbecoming a gentleman. I did not see or hear Mr. Fisher say or do anything that could have reasonably caused Judge Adams to become so upset and excited and apparently lose all self-control."

As the record reflects, the Supreme Court of the State of Texas hears no evidence in an original proceeding for habeas corpus, and the facts are placed before it in affidavits and exhibits to the pleadings of the parties. The aforementioned affidavits by the jurors and by the bystanders were attached to Petitioner's Application for Writ of Habeas Corpus in the Texas Court, and the facts recited therein were in no way controverted or challenged by the Respondent, as he might have done under Texas procedure.

Consequently, with fifteen persons uniting in saying that the demeanor of Petitioner was in no way objectionable at the time of the occurrence of the allegedly contemptuous incident, and with these fifteen persons consisting of the twelve jurors who were hearing the case on trial and the three bystanders at the trial, Petitioner respectfully submits that the record herein precludes the application of any presumption that his words may have been spoken

with a contemptuous demeanor and makes most difficult the placing of any reliance upon the fairness and objectivity of the presiding judge. Hence, insofar as the opinion of the majority of the Court is founded upon such a presumption or reliance, Petitioner submits that the opinion is in error.

II.

After making the above quoted statements relative to demeanor, the majority of the Court proceeded to hold that Petitioner was guilty of persisting in an improper argument after being instructed by the trial judge to refrain from making such an argument. In connection with this holding, Petitioner respectfully requests the Court to review the facts, and Petitioner submits that at no time did he violate any intelligible instruction on the part of the trial court, or any principle of Texas law pertaining to jury arguments.

It is said by this Court that Petitioner's jury argument brought improper information to the attention of the jury and that Petitioner made a "stubborn effort to bring excluded matter to the knowledge of the jury." Let us examine Petitioner's argument in light of these charges. If Petitioner did bring improper information to the attention of the jury he did so by imparting one or all of the following three bits of information: (a) By telling the jury that one hundred and twenty-five weeks was the maximum compensation period permitted by law. (b) By telling the jury the average weekly compensation rate. (c) By revealing to the jury the fact

that compensation is computed according to the formula of compensation period multiplied by compensation rate.

(a) In connection with the fact that Petitioner told the jury that the maximum compensation period is one hundred twenty-five weeks, it should be noticed that Petitioner mentioned this fact three times. The first two times there was no objection by opposing counsel and no instruction by the trial court. The absence of any such objection or instruction is fully understandable, for telling the jury the maximum compensation period was eminently proper argument. Of the special issues which the trial court had submitted to the jury, two—Special Issues Nos. 3 and 6 (R. 11-12)—specifically inquired as to the compensation period, and it was entirely proper for Petitioner to tell the jury that their maximum finding on this could be one hundred and twenty-five weeks—and thereby to obviate the possibility of a mistrial caused by a finding for a longer period—and to argue that they should find the maximum period. If nothing else, the failure of opposing counsel to object to this statement, even though the statement was twice repeated, indicates the properness of such a statement and its customary use in workmen's compensation cases. Consequently, there can be nothing wrong about the bare statement that one hundred twenty-five weeks is the maximum period, and opposing counsel objected only when Petitioner began to combine such statement with the weekly compensation rate.

(b) As the record reflects, the first objection to Petitioner's argument arose when he started to men-

tion the compensation rate. This rate had been stipulated, and hence it doubtless would have been improper—though clearly not reversible error—if Petitioner had stated it to the jury. When Petitioner started to state such rate, the trial judge said "That has all been agreed upon"—a statement which is solely referable to the rate, for that was the only subject of the stipulation. When Petitioner attempted to state why it might be material to inform the jury of the rate, the trial judge responded "They are not interested in dollars and cents"—again a remark which is referable only to a statement of the rate. When Petitioner again attempted to state the materiality of the rate, he was told not to argue with the court and was informed that he would be given his exception. Petitioner took his exception and resumed his argument by stating "This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law." If Petitioner is guilty of persisting in an improper argument it is because of this statement. Let us see what, if anything, is improper in such an argument. As is shown in (a) above, restating the matter of one hundred twenty-five weeks could not, standing alone, be objectionable. Petitioner refrained from informing the jury of the dollars and cents figure of the rate, and merely substituted the vague phrase "at whatever compensation the rate will figure under the law." Certainly this phrase, standing alone, cannot constitute improper argument. Consequently, if there was improper argument it was because Petitioner conjoined the two matters aforementioned

and thereby revealed to the jury the formula by which a compensation recovery is computed.

(c) If revealing the compensation formula to the jury was Petitioner's error—and it must have been if he committed any error at all—two matters of extreme importance stand out:

(1) *At no time did the trial court ever instruct Petitioner not to reveal to the jury the compensation formula.* Rather, the only thing that Petitioner was ever told by the trial court was that the jury is not interested in dollars and cents. Obviously, a man cannot be held in contempt for violating an instruction when he has received no instruction. Obviously also, under the holding in *N.L.R.B. v. Bell Oil & Gas Co., et al.*, 98 F. (2d) 405, a man cannot be held in contempt for violating an instruction which is ambiguous or unintelligible.

(2) If it be thought that there was vice in revealing the compensation formula to the jury, because such revelation informed the jury of the effect of their answers, and if it be thought that Petitioner should have recognized this, and, even in the absence of an instruction, should have refrained from stating the formula to the jury, the error in any such thoughts is revealed by the very language which the Texas Supreme Court used in discussing this case. Thus, the Texas Court stated that it is error to inform the jury as to the effect of their answers to special issues "unless, under the circumstances in the court below, the issues are such that men of ordinary intelligence would be presumed to know the legal effect of their answers." Can it be thought that any juror would be so ignorant as not to know that

recovery in a compensation case is based upon the duration of the injury, especially when the court submits express issues inquiring as to such duration? In the usual compensation case in which the compensation is not stipulated, as it was in the case at bar, but is the subject of proof, the jury is asked to find both the rate and the duration. Can it be thought that any except the most illiterate juror would be unable to put these two inquiries together and see where they lead? If Petitioner imparted any information whatsoever to the jury when he made the argument in question, it added not a whit to the information which the jurors, as men of ordinary intelligence, already possessed, and, hence under the Texas law as stated by the Texas Supreme Court, such an argument could not have been improper.

III.

Near the end of the majority opinion this Court stated "the petitioner twice refused to heed the court's admonition not to argue the point." It is of course true that the trial judge twice told Petitioner "don't argue with me"—indeed, these two instructions were the only positive instructions which Petitioner ever received, for the other remarks by the judge concerning the "dollars and cents" were in the nature of comments, rather than of orders or instructions. Now let us see how Petitioner responded to these two instructions. The first instruction, and the response, are as follows:

"By the Court: Don't argue with me. Go ahead. I will give you your exception on it.

"By Mr. Fisher: Note our exception.

"By the Court: All right."

Certainly there was no violation of the instruction in this exchange. Petitioner resumed his argument at this point, and was interrupted by the statement of opposing counsel that he was objecting to any discussion "as to what the plaintiff can recover." After this objection, the following remarks were made:

"By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.
"By Mr. Fisher: I am asking—"

Petitioner is certain that this Court has not meant to say that he violated an instruction not to argue with the trial court by starting to ask a question. Even if it could be thought that the question, if asked, might have been improper, Petitioner was never even afforded an opportunity to indicate the nature of the question. Moreover, it is apparent from the record—and is true in fact—that it was at this moment that Petitioner first realized that the trial court must have been telling him something more than to refrain from stating the compensation rate, and Petitioner started to inquire just exactly what the court had ruled. Petitioner was never enabled to make this inquiry, for the trial judge cut him off short by saying:

"Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

To this, Petitioner responded:

"Note our exception. I think I have a right to explain whether it is a specific injury or general injury."

If Petitioner at any time violated the judge's instructions against arguing with him, it was when Petitioner said "I think I have a right to explain whether it is a specific injury or general injury," but was this "arguing" with the judge? Under the Texas Rules of Practice and Procedure in Civil Actions, Rule 373, "formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court *and his grounds therefor*." Similarly, it is settled in Texas as in most other jurisdictions that a mere naked objection to action by the court is insufficient and that counsel must state the reasons for his objection. 41 *Texas Jurisprudence*, sec. 143, et seq. Consequently, if Petitioner had merely noted an exception in the remark last quoted above, his action would have been a nullity for the exception, and the objection implicit therein, would have been unaccompanied by any reason therefor. If Petitioner was to preserve his objection for appeal, and thereby to discharge his duty to his client, it was absolutely incumbent upon him to do as he did and to add the reason for his objection by stating "I think I have a right to explain whether it is a specific injury or general injury."

Hence, Petitioner respectfully submits, at no time did he refuse to heed the court's admonition not to argue. On the contrary, when he received the first such admonition, he resumed his statements to the jury, and when he received the second admonition

he stated only that which was absolutely indispensable to preserve the point for appeal. In its opinion this Court quoted with approval the language of the Texas Court to the following effect:

"It was thus the duty of counsel to abide by his [the trial judge's] rulings even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal."

Petitioner fully conformed with this rule of conduct, and the only language uttered by him which possibly could be deemed violative of the instruction against arguing was language which was absolutely necessary if Petitioner was to have a proper exception as a predicate for appeal.

WHEREFORE, Petitioner prays that this petition be granted, that this Honorable Court set aside its judgment and opinion of February 7, 1949, and that the Court enter judgment reversing the judgment of the Supreme Court of the State of Texas.

Respectfully submitted,

LOONEY, CLARK & MOORHEAD
EVERETT L. LOONEY
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Austin, Texas
Attorneys for Petitioner

I, R. Dean Moorhead, an attorney for Petitioner in the cause to which the foregoing Petition for Rehearing is directed, hereby state and certify that said Petition is presented in good faith and not for delay. I further certify that at the same time that I deposited in the United States Mails the forty copies of said Petition addressed to the Clerk of this Court, I also deposited three copies of said Petition addressed to Robert H. Hillin, Esq., whose address is County Courthouse, Jasper, Texas, the attorney for Respondent, with said copies being sent by registered mail.

R. Dean Moorhead